Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

General Notice

NOTICE OF A SIGNIFICANT NEW INFORMATION DISSEMINATION PRODUCT PURSUANT TO OMB CIRCULAR A-130; CUSTOMS AUTOMATED COMMERCIAL SYSTEM

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: This document gives the public notice of a proposed new information dissemination product. The Customs Service, through its Automated Commercial System (ACS), has been developing a module called the Automated Manifest System (AMS). Through the AMS, carriers, port authorities (PAs) and service centers electronically transmit data from inward vessel manifests to Customs. Customs uses this information concerning the nature and origin of the cargo to make decisions with respect to inspection and examination. Customs thereafter electronically informs the senders, their agents and others of this information. An underlying purpose for this exchange is to expedite the release of cargo from Customs custody.

In June, 1988, Customs intends to make available for sale to the public a *magnetic tape* which will contain data from all the manifests being transmitted electronically to Customs. At that time, Customs intends to provide to eligible PAs *on line access* to this manifest data, and to other data concerning the status of cargo moving within their port limits. This information will enable the PAs to more efficiently monitor the movement of cargo through their facilities, as well as perform their cargo release responsibilities.

Information from inward manifests is presently available to the public in hard copy, pursuant to section 431, Tariff Act of 1930, as amended, (19 U.S.C. 1431). The statute also requires that Customs safeguard the confidentiality of the names and addresses of importers, consignees and their shippers upon request. Accordingly, the names and addresses of those who have requested confidentiality will be deleted from the manifest data to be provided.

While not all of the manifests filed with Customs are filed in an automated fashion via AMS, it is envisioned that AMS will eventually contain all vessel manifest data and replace the paper manifest. Because of the amount of data involved, the increased access

that the automated format provides, and the anticipated growth of automated systems in all phases of the processing of Customs commercial transactions, Customs believes it appropriate to give notice and an opportunity to comment to those who may be interested in obtaining the information as well as those importers and consignees who may wish to request confidentiality, or are otherwise affected by release to the PAs of data pertaining to all importations arriving at their ports.

DATES: Comments must be received on or before March 15, 1988.

ADDRESS: Comments (preferably in triplicate) may be addressed to the Chief, Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, N.W., Room 2324, Washington, D.C. 20229 (202) 566–8237.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: B. James Fritz, Chief, Regulations Control and Disclosure Law Branch, (202) 566–8681. Operational Aspects: Eula D. Walden, Office of Automated Commercial System Operations (202) 566–6012.

SUPPLEMENTARY INFORMATION:

Background

OMB Circular A–130, dated December 12, 1985, 50 FR 52730, directs Federal agencies to inform the public of significant new proposed information dissemination products. Such notice is intended to allow agencies to gauge the impact of such products upon affected segments of the public. Two such products are proposed. The first is automated vessel manifest and cargo release data to PAs via on line access. The second is automated vessel manifest data to the public via magnetic tape.

For more than three years, Customs has been developing the Automated Commercial System. The ultimate goal of the ACS is to automate all phases of the commercial processing of imported merchandise and create a single automated system.

Customs has developed an Automated Manifest System (AMS) as an integral module of the ACS. The manifest module is, in essence, both an imported merchandise inventory control system and a cargo release notification system. By comparing information provided in the manifest with automated Customs entry data and inspection guidelines, Customs is able to make informed decisions with respect to the allocation of resources for the inspection of merchandise.

Automated manifest data may be transmitted to Customs by one of two methods. Carriers may transmit data directly to the AMS with their own compatible automated system. Alternatively, carriers may use the computer facilities of PAs or service centers which have established interface capability with Customs. After receiving and analyzing the data, Customs makes its decision with respect to inspection and release of the merchandise.

Once the merchandise is authorized for release, the carrier, service center or PA which transmitted the data receives a message from the system informing it of that fact. Thus each user will be able to track the status of cargo for which it transmitted data. A more detailed explanation of the data provided is set forth below.

Section 431, Tariff Act of 1930, as amended, (19 U.S.C. 1431), requires that the master of every vessel arriving in the U.S. have on board a manifest which contains, among other things, certain information with respect to the nature of the merchandise on board the vessel. Subsection (c)(1) of section 431 provides that the following information when contained on the manifest shall be made available for public disclosure:

1. The general character of the cargo;
2. The number of packages and gross weight;
3. The name of the vessel or carrier;
4. The port of loading;
5. The port of discharge;
6. The country or origin of the shipment; and
7. The name and address of each importer or consignee and the name and address of the shipper unless the importer or consignee has requested confidential treatment of such information.

Section 103.14(d), Customs Regulations, (19 CFR 103.14(d)) sets forth the procedures pursuant to which an importer or consignee may request confidential treatment of its name and address and that of its shippers. To date, Customs Headquarters has on file approximately 1,100 requests for confidential treatment.

Section 103.14(c), Customs Regulations, provides that accredited representatives of the press, including newspapers, commercial magazines, trade journals, and similar publications shall be permitted to examine vessel manifests and to copy therefrom manifest information made public by statute. Members of the general public are not given direct access to the documents but may obtain information from manifests upon request. Importers or agents are permitted to examine manifests in which they have an interest as principal or agent.

At present, Customs compiles a list of those importers and consignees who have requested confidentiality. The list is updated on a weekly basis, and is provided to all Customs offices nationwide. The list is also provided to certain commercial trade publications such as King Publishing Co., the Journal of Commerce and others. These trade publications publish the manifest data, taking steps to make certain that the names and addresses of those who have requested confidentiality are deleted.

Dissemination of Manifest Data to Port Authorities

BACKGROUND

When ACS was in the planning stages, Customs encouraged various sectors of the international trade community to participate in its development in order to share in the benefits that could accrue through the more efficient processing of commercial transactions. Among those who expressed a significant interest in ACS (particularly in AMS) were PAs. PAs viewed AMS as a means of streamlining their involvement in the processing of cargo as well as attracting new business to their ports.

Customs viewed PAs as a potential conduit for the transmission of AMS data for non-automated carriers who were interested but otherwise lacked the capability to electronically transmit their manifest data. PAs were informed that if they were willing to assume this role they would be eligible to receive all *automated manifest data* for those manifests which Customs receives for vessels calling in their ports regardless of whether the carrier used the PA to transmit its data. The data elements that comprise the manifest file are set forth in Appendix 1 to this document.

In addition to receiving manifest data, eligible PAs would be entitled to receive release data which conveys the status of the cargo which is being processed through their ports. Release data would be provided from the manifest where an automated manifest is filed at the port. In addition, where no automated manifest is filed, PAs would receive release data obtained from entry documents for all formal entries made in the port provided that the entry filer has given his written consent. The data elements pertaining to this release data are set forth in Appendix 2.

Finally, eligible PAs would receive manifest data which is transmitted through AMS with respect to all cargo which moves master in bond to their ports. For example, when a carrier files an automated manifest for cargo from a vessel which calls at Seattle but will move via master in bond procedures to Boston, the Massachusetts Port Authority will receive an extract of the manifest filed at Seattle. This will enable Massport to have a more accurate account of cargo in transit to it.

It is emphasized that the above data to be provided to PAs is to be provided via on-line access. Customs recognizes that the value of the data to the PAs as a basis for cargo release services is tied to its being provided in an expeditious manner. Accordingly, Customs intends to provide this data directly to the PA's automated system as soon as is operationally feasible.

Eligibility Criteria

In order to be eligible to receive automated manifest data, release data, and the master in bond data, a PA must develop the *full technical capacity* to transmit as well as receive AMS data. This means that the PA must demonstrate to Customs satisfaction that it pos-

sesses all the necessary facilities to be capable of immediately providing full AMS services for any interested carrier.

Customs recognizes that the development of this capacity does not guarantee that carriers will choose to avail themselves of the PAs services. One difficulty has been the fact that many carriers do not use a unique bill of lading number in their business operations. Such a unique identifier is necessary in order for AMS to operate. It is hoped, however, that a proposed amendment to the Customs Regulations mandating the use of a unique bill of lading identifier will eliminate this obstacle to participation in AMS by carriers. See 52 Fed. Reg. at 46602, dated December 9, 1987.

Customs has not established a minimum number of manifests to be transmitted in order for a PA to be eligible to receive this data. Customs will, however, condition continued access to the information on efforts by the PAs to acquire customers for this service. Should Customs learn that a PA has declined to provide AMS services when requested by a carrier, or has not made efforts to obtain participation by carriers, Customs will reevaluate its decision to provide access.

Providing Automated Manifest Data to the Public

Separate and apart from its decision to provide manifest data to PAs as described above, Customs intends to make available to the public, in the form of a magnetic tape, certain data with respect to all the manifests captured by AMS nationwide. This tape would be available at a price which would reflect the cost of producing it, and would contain the same data elements that are in the manifest file to be provided to the PAs. See Appendix 1 for the precise data elements involved. It is contemplated that the tape will be available on a weekly basis. Persons interested in receiving this tape or in obtaining further information about it may contact the Office of Automated Commercial System Operations at (202) 566–5492.

Confidentiality of Manifest Data

As noted above, the manifest data to be provided to the PAs and to the public will be sanitized by removing the names and addresses of those importers/consignees and that of their shippers when confidentiality has been requested. Customs has developed a computer program which will automatically delete the name and address of these requesters when manifests containing their name are transmitted through AMS. In determining the precise automated system to be employed, Customs was faced with a choice between using an "alpha" system or a "soundex" system. Each system has certain limitations. The alpha system will only delete the name of the importer/consignee when there is an exact match as to spelling and formulation between the way the name has been transmitted by the carrier or service center and the name that the importer has provided to Customs. Thus where abbreviations and incorrect spellings

of names are transmitted, the data would not be deleted from the system.

The soundex approach would eliminate from the system not only the exact formulation of the name in question, but also a variety of sound alike names. This approach would be overinclusive, resulting in the deletion of many names and addresses where no request for confidentiality had been made. In addition, the soundex approach requires a significantly more complex programming effort.

Customs intends to use the alpha approach. In order to safeguard the names and addresses of companies which have requested confidentiality, however, Customs advised each of the requesters of the limitations of the system and invited them to enumerate variations of their name which they believe may be transmitted into AMS. Many importers have responded with these variations and Customs has added them to its database so that confidentiality will be protected whenever a match is made between any of the versions of the name submitted and the version transmitted by the carrier. A copy of the letter to the requesters is provided as Appendix 3 to this document. Customs remains willing to program these additional variations as they are received, as well as new requests for confidentiality. Such requests should be directed to the Regulations Control and Disclosure Law Branch, Customs Headquarters: Attention: Mr. Crowley.

Dissemination of the Entry Number

Among the data elements which will be provided to the port authorities as part of the bill of lading status report is the entry number assigned to the goods once entry has been filed. See Appendix 2 to this document. Providing this entry number is an essential link between the data in the manifest file and entry process.

Customs has identified two potential issues with respect to providing the entry number to the PAs. Each of these issues relates to Customs obligation to protect the identity of the importer or consignee of the merchandise when confidentiality has been requested.

The Bulletin Notice of Liquidation, Customs Form 4333, lists the entry number together with the name of the entry filer. By matching this data with the manifest data being provided, one may determine the identity of the entry filer and the nature of the goods being imported despite the importer's request for confidentiality. In order to resolve this issue, Customs has decided to amend the Bulletin Notice of Liquidation so as to remove any reference to the name of the entry filer. Importers and brokers will be able to identify their entries through the entry number.

The second issue that is presented with dissemination of the entry number arises because the first three digits of the entry number (the National Filer Code) identify the broker or importer filing the entry. Knowing an importer's filer code together with the manifest data would clearly enable a person to link the importer to the par-

ticular goods being imported. Even where the filer code pertains to a broker, in some instances, knowledge of the broker and the port involved is tantamount to knowledge of the identity of the importer. In each case, confidentiality would be breached. In order to protect against this unintended effect, Customs has decided to offer any importer or broker who has a presently assigned filer code an opportunity to apply for a new filer code. This code will not be revealed by Customs to any third party without the authorization of the entry filer so that the filer code will not be a means by which the filer's identity may be ascertained. Persons interested in obtaining a new filer code should write to the Office of Automated Commercial Systems, Customs Headquarters, Attention: Dick Bonner.

COMMENTS

Customs invites comments on any aspect of this proposed information dissemination product. Commenters might particularly address the impact, if any, of Customs proposed actions on their conduct of Customs business. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4 Treasury Department Regulations (31 CFR 1.4) and section 103.11(b), Customs Regulations (19 CFR 103.11(b)) on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control and Disclosure Law Branch, Room 2324, U.S. Customs Headquarters, 1301 Constitution Avenue NW., Washington, D.C. 20229.

Dated: January 12, 1988.

E.H. MACH,
Assistant Commissioner,
Office of Commercial Operations.

APPENDIX 1

Data elements from the manifest to be provided to eligible port authorities via online access and to the public via magnetic tape:

1. Carrier code.
2. Vessel country code.
3. Vessel name.
4. Voyage number.
5. District/port of unlading.
6. Estimated arrival date.
7. Bill of lading number.
8. Foreign port of lading.
9. Manifest quantity.
10. Manifest units.
11. Weight.
12. Weight unit.
13. Shipper name.*
14. Shipper address.*
15. Consignee name.*

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*Data element will be deleted where confidentiality has been requested.

16. Consignee address.*
17. Piece count.
18. Description of goods.
19. Container number.
20. Seal number.

APPENDIX 2

Cargo release data elements derived from the manifest or from entry documents** to be provided to eligible port authorities via on-line access:

1. Carrier code.
2. District/port of unlading.
3. Vessel name.***
4. Voyage number.***
5. Bill of lading number.
6. Disposition code.
7. Quantity.
8. Entry type.
9. Entry number.
10. Action date and time.

APPENDIX 3

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., October 19, 1987.

DIS-3:CO:R:R:D
575949 MBH

DEAR SIR OR MADAME:

This is in reference to previous correspondence from your company to the Customs Service in which you requested confidentiality for your name and address and that of your shippers on inward vessel cargo manifests.

The Customs Service wishes to inform you that it is in the process of changing the method by which it collects and disseminates inward cargo manifest data. Customs is developing an Automated Manifest System which will process vessel manifest data transmitted electronically by carriers, port authorities and others. In return, Customs will provide certain manifest data and information concerning the release of the goods electronically to these parties. The system is designed to improve efficiency in the inspection and cargo release process.

As you know, Customs is required by law to make certain manifest information available to the public except for the names and addresses of importers/consignees and that of their shippers when confidentiality is requested. In the near future, this manifest data will be available to any requester in the form of a magnetic computer tape. Requests for confidentiality will continue to be honored. The limitations of the automated system are such, however, that it will only safeguard the precise spelling of the company's name that is provided to it. *Therefore, in order to safeguard your data, it is essential that you provide within 10 working days of your receipt of this letter all spellings or formulations* (such as abbreviations) of the name of your company that appear or could appear on the manifest or related shipping documents. These spellings or formulations will be entered into the computer data base so as to protect any transactions on which the formulation appears.

*Data element will be deleted where confidentiality has been requested.

**Where the source is entry documents, data relating to formal entries will be furnished, provided that the written consent of the entry filer is obtained.

***This element will only be provided where an automated manifest or an ABI entry has been filed.

A more detailed explanation of the Automated Manifest System and the release of vessel manifest information will appear in the Federal Register shortly. Your comments on that notice would be appreciated. If you have any questions concerning this matter, you may contact Gerald Crowley at (202) 566–8681.

Sincerely,

B. JAMES FRITZ,
Director, Regulations Control and Disclosure Law Division.

[Published in the Federal Register, January 15, 1988 (53 FR 1097)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 132 and 142

PROPOSED CUSTOMS REGULATIONS AMENDMENTS REGARDING QUOTA QUANTITY ENTRY LIMITS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations with regard to the quantity of quota-class merchandise which may be entered at the opening of a quota. This proposal would clarify the current regulations and correct a situation whereby some importers have attempted to receive a quantity of quota-class merchandise in excess of their pro rata share by filing multiple entries. In the past, when importers filed entries for a quota quantity in excess of the known quota restraint level, Customs has reduced the importer's total quantity presented to the restraint level and then authorized release according to that importer's pro rata share. This share was computed by comparing the quantities of all entry summaries to the available quota quantity to obtain the percentage of available quota quantity to be allocated to each importer. This procedure involves a considerable workload for Customs quota control personnel because, if the total quantity presented by an importer is not matched with that importer, the importer could be allocated a quantity in excess of the quantity of quota-class merchandise it should have received. Thus, an importer who failed to comply with the regulations could gain an unfair advantage over importers who do comply. Under this proposal, entries for excess quantities would be rejected as not being in proper form rather than being reduced to the appropriate quantity and grouped with all other entries for the allocation of available quota quantity. Accordingly, importers who do not file entries or withdrawals for consumption of quota-class merchandise for a quantity above the quota restraint level would be more certain to receive their proper pro rata share of the merchandise. The proposal would also make certain non-substantive technical amendments to clarify and simplify the existing regulations.

DATE: Comments must be received on or before March 21, 1988.

ADDRESS: Comments (preferably in triplicate,) may be addressed to and inspected at the Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2324, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Karen Cooper, Quota Branch, Regulatory Trade Programs Division (202–566–8592).

SUPPLEMENTARY INFORMATION:

Background

An import quota is a control on the number of units or on the duty rate of specified merchandise which may be entered into the commerce of the U.S. during a specified period of time. There are two types of Customs administered import quotas; absolute and tariff-rate. An absolute quota is a limit, or control on the total number of units of specified merchandise which may be entered during a specified period of time. A tariff-rate quota is a control on the quantity of merchandise which may be entered at a specified rate of duty. Under a tariff-rate quota there is no limit on the total quantity of merchandise permitted to enter, but quantities of the merchandise in excess of a quantity permitted to enter the U.S. at a specified duty rate, are subject to a higher duty rate. The limitations, which may be established by legislation, are published in the Tariff Schedules of the United States (19 U.S.C. 1202) and the Customs Bulletin.

To ensure that all importers have an equal opportunity to enter merchandise that is subject to a quota, rules and procedures applicable to quotas administered by Customs, have been developed and published in Part 132, Customs Regulations (19 CFR Part 132).

Section 132.4, Customs Regulations (19 CFR 132.4), provides that at the opening of the quota, no importer shall be permitted to present entries or withdrawals for consumption of quota-class merchandise for a quantity in excess of the quantity admissible under the applicable quota.

When a quota is expected to fill at opening and the total quantity presented exceeds the quota quantity available, a pro rata share is distributed to each importer. The pro rata share is based on the ratio of total quantity presented to total quantity authorized to enter under the restraint level. Although § 132.4, Customs Regulations (19 CFR 132.4), provides than an importer shall not be permitted to present entries or withdrawals for quota-class merchandise for a quantity in excess of the quantity admissible under the applicable quota, some importers file entries for excess quantities. By filing multiple entries, these importers file for an aggregate quantity of the quota merchandise in excess of the admissible quantity. Customs quota control personnel must, therefore, ascertain if any importer made presentations in excess of the quota restraint level. When it has been ascertained that a particular importer's total

presentations exceed the quota restraint level, the practice has been to decrease the importer's total presentations down to the quota restraint level and to authorize release according to that importer's pro rata share. This share, as provided for in § 132.12(c), Customs Regulations (19 CFR 132.12(c)), was computed by comparing the quantities on all entry summaries to the available quota quantity to obtain the percentage of available quota quantity to be allocated to each importer. This procedure involves a considerable workload for Customs quota control personnel because, if the total presentations by an importer are not matched with that importer, the importer could be allocated a quantity in excess of the quantity it should receive. Thus, an importer who fails to comply with the regulations could gain an unfair advantage over importers who do comply. To correct this situation, Customs proposes to consider all entries for quota-class merchandise filed by a particular importer, when the quantity of merchandise covered thereby exceeds the quantity admissible under the applicable quota, as not being in proper form and to reject them. This would require the importer to file a new entry. The proposal would also make certain nonsubstantive technical amendments to clarify and simplify the existing regulations.

Proposed Action

Accordingly, it is proposed to add a sentence to § 132.4, Customs Regulations (19 CFR 132.4), to make it clear that when an importer files entries or withdrawals for consumption for quantities of quota-class merchandise in excess of the admissible quantity, those entries and withdrawals will be rejected and returned to the importer.

Comments

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2324, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was Arnold L. Sarasky, Regulations Control Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 132

Customs duties and inspection, Imports and Quotas.

19 CRF Part 142

Customs duties and inspection, and Imports

PROPOSED AMENDMENTS

It is proposed to amend Part 132, Customs Regulations (19 CFR Part 132), as set forth below:

PART 132—QUOTAS

1. The authority citation for Part 132 would continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (Gen. Headnote 11), and 1624.

2. It is proposed to revise § 132.4 to read as follows:

§ 132.4 Quota quantity entry limits.

At the opening of the quota no importer shall be permitted to present entries or withdrawals for consumption of quota-class merchandise for a quantity in excess of the quantity admissible under the applicable quota. If the total presentations by an importer exceed the quantity admissible under the quota, they will be considered to not be in proper form and will be returned to the importer.

3. It is proposed to revise the third sentence of § 132.13(a)(1)(i) to read as follows:

§ 132.13 Quotas after opening.

(a) *Procedure when nearing fulfillment.*

* * * * * * *

(1) *For release of merchandise*—(i) *Tariff-rate.*

* * * * * * *

This section does not prohibit an importer from obtaining release of the merchandise under the immediate delivery or entry procedure.

* * * * * * *

It is proposed to amend Part 142, Customs Regulations (19 CFR Part 142), as set forth below:

PART 142—ENTRY PROCESS

1. The authority citation for Part 142 would continue to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1623, 1624.

2. It is proposed to revise the first sentence of § 142.21(e)(1) to read as follows:

§ 142.21 Merchandise eligible for special permit for immediate delivery.

(e) *Quota-class merchandise*—(1) *Tariff-rate.* At the discretion of the district director, merchandise subject to a tariff-rate quota may be released under an entry or a special permit for immediate delivery provided the importer has on file a bond on Customs Form 301, containing the bond conditions set forth in § 113.62 of this chapter.

* * * * * * *

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: December 28, 1987.
JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, January 19, 1988 (53 FR 1376)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 87-1331)

AUSTIN CHEMICAL CO., INC., PLAINTIFF-APPELLEE *v.*
UNITED STATES, DEFENDANT-APPELLANT

Paul F. Stack, of Stack & Filpi, Chicago, Illinois, argued for appellee. With him on the brief was *John J. Kakacek,* of Stack & Filpi, Chicago, Illinois.

Kenneth N. Wolf, of the Department of Justice, Commercial Litigation Branch, Washington, D.C., argued for appellant. With him on the brief were *Richard K. Willard,* Assistant Attorney General, *David M. Cohen,* Director, and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

(Decided December 31, 1987)

Before FRIEDMAN and DAVIS, *Circuit Judges,* and COWEN, *Senior Circuit Judge.*

FRIEDMAN, *Circuit Judge.*

The United States appeals, pursuant to 28 U.S.C. § 1295(a)(5) (1982), from a judgment of the United States Court of International Trade that reversed a Customs Service classification of a drug, 659 F. Supp. 229 (Ct. Int'l Trade 1987). We affirm.

I

A. The issue in this case is the proper classification for Customs purposes of imported D(–) mandelic acid. Mandelic acid can exist in two three-dimensional forms or "isomers": D(–) and L(+). A one-to-one (or "racemic") mixture is called DL mandelic acid. When only one isomer is present the compound is said to be "optically pure."

Austin Chemical Company (Austin) imported D(–) mandelic acid from Korea and sold it to Eli Lilly & Company (Lilly). Lilly used it to manufacture Cefamandole Nafate, a cephalosporin or beta-lactam antibiotic. Synthesizing the antibiotic is a multistep process during which the mandelic acid undergoes various chemical changes. When the synthesis is complete, the antibiotic has a mandelic acid "moiety" or major portion of the original mandelic acid molecule.

The antibiotic kills bacteria by inhibiting the growth of bacterial cell walls. Bacteria, however, are not defenseless. They produce enzymes (called beta-lactamases) which can render the antibiotic ineffective. The mandelic acid moiety protects the beta-lactam portion of the drug which kills bacteria from these destructive bacterial enzymes, thereby enhancing the drug's effectiveness.

The United States Customs Service classified the imported D(–) mandelic acid under item 404.46 of the Tariff Schedules of the United States (TSUS):

> Cyclic organic chemical products in any physical form having a benzeneoid, quinoid, or modified benzeneoid structure, not provided for in subpart A or C of this part:
>
> * * * * * * *
>
> Other:
>
> Products provided for in the Chemical Appendix to the Tariff Schedules. 1.7¢ per lb. + 17.9% ad val.

Austin protested the classification and sought reclassification under TSUS 411.91, under which the merchandise would enter duty free:

> Products suitable for medicinal use and drugs:
> Obtained, derived, or manufactured in whole or in part from any product provided for in sub-part A or B of this part:
> Drugs:
> Other:
>
> * * * * * * *
>
> Anti-infective agents, not specially provided for:
>
> * * * * * * *
>
> Mandelic acid.

After the District Director of Customs denied Austin's protest, Austin brought suit in the Court of International Trade seeking reclassification and a refund of the duties paid plus interest.

The issues at trial were whether the TSUS definition of "drugs" includes D(–) mandelic acid and whether D(–) mandelic acid is *eo nomine* "mandelic acid" under TSUS item 411.91.

B. TSUS Schedule 4, part 1, subpart C, headnote 9, defines "drugs" as:

> those substances having therapeutic or medicinal properties and chiefly used as medicines or as ingredients in medicines.

Thus, in order to classify D(–) mandelic acid as a "drug" it must have therapeutic or medicinal properties and be chiefly used as an ingredient in medicine. The trial court found that both prongs of the test were met.

The court found that D(–) mandelic acid had therapeutic properties because the mandelic acid moiety enhances the antibiotic activity of the drug:

> Concededly, this isomer of mandelic acid may not be used alone as a curative; however, it does impart properties to the other substances which are necessary to produce an effective antibiotic. The criterion for a drug is not that it be therapeutic but that it possess therapeutic properties. The ability of the mandelic acid to prevent the breakdown of the beta-lactams cannot be denied. When a substance which possesses such desirable properties, although incapable of use alone, is combined with other substances to produce the physiological action to correct the deficient condition, it may properly be classified as a drug. *Synthetic Patents Co., Inc.* v. *United States,* 12 Cust. Ct. 148, C.D. 845 (1944); *Synthetic Patents Co., Inc.* v. *United States,* 11 Cust. Ct. 147, C.D. 813 (1943). Therefore, it appears that this characteristic which relates to the treatment of disease by a remedial agent or method is thus, a "therapeutic property".

659 F. Supp. at 231–32 (footnote omitted).

The court reasoned that D(–) mandelic acid is used as an ingredient in medicine because compounds (i.e., the antibiotic which is a medicine) are composed of ingredients (i.e., mandelic acid). The court rejected the testimony of the government's witness, Dr. Georg, that "she would not refer to D(–) mandelic acid as an ingredient in medicine, since she limits that term to those ingredients listed on a label of medicine." 659 F. Supp. at 233.

The court held that D(–) mandelic acid should have been classified as a drug since it had therapeutic properties and was chiefly used as an ingredient in medicine.

C. The trial court further held that D(–) mandelic acid is *eo nomine* "mandelic acid" under TSUS item 411.91. The court reasoned that

> there is no separate provision in the Tariff Schedules for the different isomers of mandelic acid. While the merchandise may have been identified for purchase as D(–) mandelic acid, rather than generically as mandelic acid, that does not form the basis to conclude that this isomer is something other than the mandelic acid described in item 411.91, TSUS * * *. Since the merchandise in issue satisfies the superior heading of drugs in that it has therapeutic properties and is an ingredient in medicine, which are the only qualifiers of this *eo nomine* provision, the D(–) mandelic acid is properly classifiable under item 411.91, TSUS.

659 F. Supp. at 234.

The court's judgment ordered the Customs Service to "reliquidate the [merchandise] under item 411.91, TSUS, together with duty at the rate prevailing at the time of entry, and [to] refund any excess duties paid together with interest, as provided by law." *Id.*

II

The government challenges the trial court's rulings that D(–) mandelic acid has therapeutic properties and is used chiefly as an

ingredient in medicine. Both arguments rest primarily on the fact that only a moiety of the molecule prevents the breakdown of the antibiotic. The government contends that because Austin imported D(–) mandelic acid, and not the moiety, classification of D(–) mandelic acid as a drug was improper.

The rule of construction of tariff statutes is that " 'in order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported.' " *United States* v. *Citroen,* 223 U.S. 407, 414–415 (1912) (citations omitted); *Carling Elec. Co.* v. *United States,* 757 F.2d 1285, 1287 (Fed. Cir. 1985). According to the government, this rule requires that for D(–) mandelic acid to be classified as a drug, the imported product itself must have therapeutic properties.

The Court of International Trade properly relied on reference materials, expert testimony and dictionary definitions in ruling that "therapeutic" properties include the imparting of "properties to the other substances which are necessary to produce an effective antibiotic." 659 F. Supp. at 231.

> [I]t is fundamental that tariff terms are to be construed in accordance with their common meaning. It is equally fundamental that common meaning is a question of law to be determined by the court and that in determining common meaning, the court may consult dictionaries, lexicons, the testimony of record, and other reliable sources of information as an aid to its knowledge.

Pistorino & Co. v. *United States,* 461 F. Supp. 331, 334, 81 Cust. Ct. 37, 41, C.D. 4763 (1978) (citation omitted), *aff'd,* 599 F.2d 444 (C.C.P.A. 1979).

The court noted the testimony of Dr. Perry, Lilly's research advisor, that D(–) mandelic acid had an important role in making the antibiotic effective, and referred to dictionary definitions of "therapeutic" as "remedies" "relating to the treatment of disease." 659 F. Supp. at 231.

The court considered but rejected the testimony of the government's witness, Dr. Georg, who "was of the opinion that the therapeutic properties of the antibiotic lay with the beta-lactam system. She concurred with the dictionary definition of therapeutic and concluded that the D(–) mandelic acid was not therapeutic or medicinal but did not reason why." 659 F. Supp. at 231.

In light of the evidence that the mandelic acid moiety prevents the breakdown of the antibiotic, and the dictionary definitions of "therapeutic," we cannot say the trial court erred in concluding that D(–) mandelic acid has therapeutic properties.

The government also contends that the trial court improperly determined that D(–) mandelic acid is an ingredient used in medicine. The government argues that "ingredient" is not the same as "ingredient used in medicine." It relies on Dr. Georg's testimony that she

would only consider items listed on the label of a drug to be ingredients in medicine. According to Dr. Georg, "mixtures, *not* compounds are composed of ingredients," and the only "ingredient" in the antibiotic is the antibiotic itself. 659 F. Supp. at 233 (emphasis in original). The government asserts that the trial court erroneously relied upon the testimony of Austin's witness, Dr. Kartinos, who adopted the definition of "ingredient" from a medical reference book.

The weight to be accorded expert testimony is a matter for the trial court, not the appellate court, to determine. The Court of International Trade cannot be faulted for rejecting Dr. Georg's definition of "ingredient" and following the dictionary definitions of that term, which accord with the views of Dr. Kartinos. The court did not err in holding that D(–) mandelic acid was used as an ingredient in medicine within the meaning of the TSUS definition of drug.

The trial court's determination that D(–) mandelic acid is *eo nomine* the drug "mandelic acid" under TSUS 411.91 has not been shown to be in error. The government has not demonstrated that the tariff item "mandelic acid" does not include the D(–) isomer of that product. "Mandelic acid" is a comprehensive term, and there is no indication that Congress intended to exclude from it the D(–) isomer or to limit the term, as the government would do, to DL mandelic acid, which is comprised of an equal mixture of the D(–) and L(+) isomers. As this court has stated:

> One who argues that a term in the tariff laws should not be given its common or dictionary meaning must prove that "there is a different commercial meaning in existence which is definite, uniform, and general throughout the trade."

Rohm & Haas Co. v. *United States,* 727 F.2d 1095, 1097 (Fed. Cir. 1984) (citing *Moscahlades Bros.* v. *United States,* 42 C.C.P.A. 78, 82 (1954)). The government has not shown that "mandelic acid" has a commercial meaning that would exclude D(–) mandelic acid.

Conclusion

The judgment of the Court of International Trade is

AFFIRMED

(Appeal No. 87-1364)

Telectronics Proprietary, Ltd., plaintiff-appellee *v.* Medtronic, Inc., defendant-appellant *v.* Telectronics, Inc., and Telectronics USA, additional defendants on counterclaim-appellees

Allen I. Rubenstein, Gottlieb, Rackman & Reisman, P.C., of New York, New York, argued for plaintiff-appellee. With him on the brief was *Michael I. Rackman.* Also on the brief was *William C. Nealon,* or Suffield, Connecticut.

Grady J. Frenchick, Medtronic, Inc., of Minneapolis, Minnesota, argued for defendant-appellant. With him on the brief was *Robert C. Beck*.

Appealed from: U.S. District Court for the Southern District of New York.
Judge LEISURE.

(Decided January 6, 1988)

Before SMITH, *Circuit Judge*, BALDWIN, *Senior Circuit Judge*, and BISSELL, *Circuit Judge*.

BISSELL, *Circuit Judge*.

This court accepted an interlocutory appeal of an order, dated September 8, 1986, 83 Civ. No. 8568–Leisure [hereinafter September 8 Order], from the District Court for the Southern District of New York. The district court stated the controlling question of law as:

> Whether, consistent with the Code of Professional Responsibility of the American Bar Association or the Model Rules of Professional Conduct, a patent attorney can work with a corporate inventor to draft or prosecute a patent application to issuance of a patent and subsequently, despite the objection of both the corporate inventor and a later assignee of the patent, represent interests seeking to invalidate or narrowly construe the selfsame patent.

Telectronics Proprietary, Ltd. v. *Medtronic, Inc.*, 83 Civ. No. 8568–Leisure (S.D.N.Y. Jan. 7, 1987) (order granting Request for Certification of September 8 Order) [hereinafter Certification Order]. The motion of Medtronic, Inc. to disqualify William C. Nealon and Michael I. Rackman and his law firm, Gottlieb, Rackman & Reisman, as counsel for Telectronics Proprietary, Ltd., Telectronics, Inc., and Telectronics U.S.A., Inc. (collectively "Telectronics"), was denied with qualification in the September 8 Order. In the context of the facts of this case, we affirm the September 8 Order.

BACKGROUND

This dispute began in August 1983 with an International Trade Commission (ITC) investigation denominated In re Certain Cardiac Pacemakers and Components Thereof, Inv. No. 337–TA–162 [hereinafter Cardiac Pacemakers]. Medtronic sought relief under 19 U.S.C. § 1337 (Supp. III 1985) for alleged infringement by Telectronics of Medtronic's four patents—United States Letters Patent Nos. 3,648,707 ('707), 4,059,116 ('116), 4,312,355 ('355), and 3,595,242 ('242).

In November 1983, Telectronics filed this declaratory judgment action seeking a declaration of patent invalidity, unenforceability, and noninfringement with respect to the '707, '116, and '355 patents. Medtronic counterclaimed for infringement of these three patents and the '242 patent, and sought a declaration that the four pat-

ents were valid, infringed and enforceable. Because Medtronic put the '242 patent at issue, Telectronics filed a First Amended and Supplemental Complaint requesting that all four patents be declared invalid and unenforceable, and that Telectronics be declared not to have infringed the patents.

Medtronic moved to disqualify counsel. It argued that Nealon and Rackman had served as in-house and outside counsel respectively, for American Optical Corporation (AO), the original patent holder, and that they had participated in the prosecution of the '242 patent for AO. Medtronic urged that it was improper for Nealon and Rackman, now attorneys for Telectronics, to challenge the validity of the '242 patent.

Medtronic claimed the status of "former client" for itself, as assignee of the '242 patent. It also claimed this for its employee, Barouh V. Berkovits, the inventor of the '242 patent, who was employed by AO when the patent was prosecuted. On this basis, Medtronic contended that representation of Telectronics by Rackman and Nealon was contrary to the ethical requirements of Canons 4, 5, 7, and 9 of the Code of Professional Responsibility of the American Bar Association (ABA). Telectronics opposed the disqualification motion on the grounds of: (1) *res judicata* because of the denial of a similar motion in a related case before the ITC, (2) laches, and (3) the absence of conflict between representation by Rackman and Nealon and the ABA Code of Professional Responsibility.

Without reaching the issues of *res judicata* and laches, the district court in the September 8 Order denied Medtronic's motion to disqualify counsel conditioned on Telectronics' not raising an issue of fraud or misconduct regarding the prosecution of the '242 patent, and restricting its proof of obviousness to art discovered after the issuance of the patent. On January 7, 1987, the district court granted Medtronic's Request for Certification of the September 8 Order, and granted it permission to petition this court to accept an appeal of the September 8 Order. We accepted the appeal on May 22, 1987.

THE '242 PATENT

The Inventor

Berkovits, while an employee and director of research and development of AO, invented a cardiac pacemaker relating to dual chamber cardiac pacing. On March 4, 1969, Berkovits assigned to AO his entire interest in the invention. A patent application was filed which issued on July 27, 1971, as the '242 patent. Berkovits, on terminating his employment with AO in 1975, assumed his current employment with Medtronic.

Ownership and Licensing

Medtronic is the current owner of the '242 patent; Telectronics is a current licensee. The history of the ownership, licensing, and suc-

cessive assignments of the '242 patent, although complex, is most pertinent to the issue under review.

Telectronics acquired its license to make, use, and sell products covered by the '242 patent as follows. In 1973, AO granted to N.V. Philips Gloeilampenfabrieken (Philips) a non-exclusive license under the '242 patent for pacer devices. In 1976, the parties amended the agreement such that AO granted Philips a paid-up license for external pacer devices, but Philips would continue royalty payments to AO on the implantable pacer devices. In 1981, Philips transferred its '242 patent license rights to a joint venture with Honeywell, Inc. Subsequent transactions between Honeywell, Inc. and Philips resulted in Honeywell Medical Electronics (HME) acquiring in 1983 all license rights under the amended 1973 AO-Philips agreement. In 1984, HME assigned these rights to Telectronics. Contemporaneously, Telectronics concluded negotiations with Warner Lambert Technologies (WLT), the successor to AO and thus the licensor of the '242 patent under the amended 1973 AO-Philips agreement, for a paid-up license on the implantable pacer devices. Accordingly, Telectronics became the final and current licensee under the amended 1973 A0-Philips licensing agreement.

The history of Medtronic's acquisition of the '242 patent is equally complex. In 1975, the original owner, AO sold the '242 patent to MT, Inc., subject to AO's continuing right as a licensor to receive royalties under its existing licenses. Thereafter, two assignments were executed: in 1976, AO assigned the '242 patent to American Pacemaker Corporation (APC), as successor-in-name to MT, Inc.; and in 1979, APC assigned that patent to Medtronic.

ITC Investigation

On the basis of the above history of licensing and assignments, the ITC determined that Telectronics had acquired a license to make, use, and sell products covered by the '242 patent from parties whose rights were superior to those of Medtronic, and dismissed Medtronic's complaint. Cardiac Pacemakers, Order No. 52 (May 25, 1984). In addition, the ITC denied Medtronic's motion to disqualify Rackman and his firm without opinion. Cardiac Pacemakers, Order No. 44 (Apr. 27, 1984). After Medtronic filed a notice of appeal of Order No. 52 and Order No. 44 in this court, Medtronic moved for a voluntary dismissal of the appeal, which this court granted with prejudice.

The Attorneys

Rackman has been Telectronics' primary outside patent counsel for about seven years. However, it is undisputed that an attorney-client relationship existed between Rackman and AO. Rackman, while an associate of the law firm of Amster and Rothstein, had served as outside patent counsel for AO in the 1960's. He prepared several draft applications for AO, some involving pacemaker technology, others involving non-pacemaker technology. Rackman had

occasion to meet with AO in connection with these draft applications, and on these visits he met with Berkovits. Rackman avers that he has no recollection of working on a draft of the '242 patent application, but does not deny it because the '242 patent application drawings are in a style that he used. However, his name is not of record in the file history of the '242 patent. He avers that he has had no access to files concerning the '242 matter for over fifteen years, since his departure from Amster & Rothstein, and that Amster & Rothstein no longer has a '242 file. Hence, his only knowledge of the prosecution of the '242 patent is what is present in the public record.

Nealon has been in-house patent counsel for Telectronics since 1977. His attorney-client relationship with AO is also undisputed, because he was AO's in-house patent counsel during the period at issue. On March 4, 1969, Berkovits, as inventor, appointed Nealon and two other attorneys, "my Attorneys, with full power of substitution, and revocation to prosecute [the '242 patent] application, and to make alterations and amendments therein." All correspondence with the United States Patent and Trademark Office was sent to Nealon as principal attorney. According to the file history in the PTO, Nealon communicated with the PTO at least four times during the prosecution of the patent application.

OPINION

I. JURISDICTION

We accept jurisdiction over the September 8 Order denying disqualification under 28 U.S.C. § 1292(c)(1)(Supp. III 1985). The district court certified that the Order involved a controlling question of law, and that certification would materially advance the interests of the litigants, and the interests of judicial economy. *Sun Studs, Inc.* v. *Applied Theory Assocs., Inc.*, 772 F.2d 1557, 1566, 227 USPQ 81, 87 (Fed. Cir. 1985).

II. CHOICE OF LAW

We follow Second Circuit precedent in deciding this procedural question. *Sun Studs*, 772 F.2d at 1566, 227 USPQ at 87; *Panduit Corp.* v. *All States Plastic Mfg. Co.*, 744 F.2d 1564, 1572–76, 223 USPQ 465, 469–72 (Fed. Cir. 1984). That court has stated that "a motion to disqualify an attorney is addressed to the discretion of the district court, and a ruling thereon will not be overturned absent a determination of abuse of discretion." *Cheng* v. *GAF Corp.*, 631 F.2d 1052, 1055 (2d Cir. 1980), *vacated on other grounds*, 450 U.S. 903 (1981) (citing *Hull* v. *Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975)). The question thus raised in this appeal is whether the district court's refusal to disqualify Nealon and Rackman and his firm was such an abuse.

III. Discussion

The Second Circuit has recognized the ABA Code of Professional Responsibility as providing appropriate guidance in disqualification proceedings. *Cheng*, 631 F.2d at 1055. However, that Circuit has adopted a "restrained approach" to attorney disqualification by focusing "primarily on preserving the integrity of the trial process." *Armstrong* v. McAlpin, 625 F.2d 433, 444 (2d Cir. 1980) (en banc), *vacated and remanded on other grounds*, 449 U.S. 1106 (1981) (citing *Board of Educ. of New York* v. *Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979)). Thus,

> with rare exceptions disqualification has been ordered only in essentially two kinds of cases: (1) where an attorney's conflict of interests in violation of Canons 5 and 9 of the Code of Professional Responsibility undermines the court's confidence in the vigor of the attorney's representation of his client * * * or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example, in violation of Canons 4 and 9, thus giving his present client an unfair advantage * * *.
>
> * * * * * * *
>
> Weighing the needs of efficient judicial administration against the potential advantage of immediate preventive measures, we believe that unless an attorney's conduct tends to "taint the underlying trial," by disturbing the balance of the presentations in one of the two ways indicated above, courts should be quite hesitant to disqualify an attorney.

Board of Educ. v. *Nyquist*, 590 F.2d at 1246 (footnotes and citations omitted).

Disqualification under Canon 4

Canon 4 of the ABA Code of Professional Responsibility provides that "[a] lawyer should preserve the confidences and secrets of a client." Disqualification may be appropriate if:

> (1) the moving party is a former client of the adverse party's counsel; (2) there is substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and (3) the attorney whose disqualification is sought had access to, or was likely to have access to, relevant privileged information in the course of his prior representation of the client.

SMI Indus. Canada Ltd. v. *Caelter Indus., Inc.*, 586 F. Supp. 808, 815, 223 USPQ 742, 746 (N.D.N.Y. 1984) (citing *Evans* v. *Artek Sys. Corp.*, 715 F.2d 788, 791 (2d Cir. 1983); *Cheng*, 631 F.2d at 1055–56; Code of Professional Responsibility, Canon 4, Disciplinary Rule (DR) 4–101(B)(1980)); *see also Emle Indus., Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 570 (2d Cir. 1973). Thus, if no attorney-client relationship exists, no potential violation of Canon 4 can occur. *SMI Indus.*, 586 F. Supp. at 816, 223 USPQ at 747.

Medtronic claimed "former client" status as the assignee of AO. The district court correctly found that Medtronic was never a client of either Rackman or Nealon because the assignment of a patent does not transfer an attorney-client relationship. *See SMI Indus.*, 586 F. Supp. at 815, 223 USPQ at 747 (assignee of assets does not stand in shoes of its assignor for purposes of Canon 4) (citing *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 190 USPQ 523 (5th Cir. 1976); *Beghin-Say* v. *Rasmussen*, 212 USPQ 614 (Dec. Comm'r Pat. 1980)).

Medtronic also contended that the inventor, Berkovits, is entitled to "former client" status. Again, the district court correctly found that no attorney-client relationship existed. Berkovits was not the alter ego of AO. The patent was not issued to Berkovits, but to the original patentee, AO. Berkovits, as an employee of the corporation, merely assisted AO's attorneys in preparing and prosecuting the patent application, including the routine execution of a power of attorney appointing the attorneys chosen by AO. *See Sun Studs*, 772 F.2d at 1568, 227 USPQ at 89. Any confidences imparted to AO's attorneys were shielded solely by AO's attorney-client privilege, which was waived by AO's successor, WLT. Although Berkovits stated that Rackman had free access to his files and that he considered Rackman his lawyer, the district court found that Berkovits could not have reasonably expected that any information he conveyed to Rackman would have been withheld from AO. In sum, we hold there was no abuse of discretion in the district court's conclusion that Canon 4 was not violated because no attorney-client relationship existed between Medtronic or Berkovits, and Rackman or Nealon.

Disqualification under Canon 5

Medtronic contended that disqualification is required under Canon 5. Under this canon, if it is obvious that a lawyer or one in his firm ought to be called as a witness on behalf of his client, he and his firm must withdraw from the conduct of the trial, and may not continue representation in the trial. DR 5-102(A).

The district court concluded that Canon 5 was inapplicable to Nealon because he will not actually participate at trial. The court intrepreted the Code of Professional Responsibility as precluding a dual role for an attorney only when he will testify, and is also involved in "the conduct of the trial." DR 5-102(A).

Medtronic contends that Rackman must be disqualified because he will be a witness on the issue of "new prior art." Because the issues of fraud or misconduct in the prosecution of the patent were absent from the case, the district court determined that Rackman's necessity as a witness depended on the evidence to be considered in the factual evaluation of obviousness. After careful consideration of the nature of the evidence to be introduced on the issue of obviousness, and because the obviousness issue relates solely to newly

discovered prior art and not to whether the patents were properly procured in the first instance, the district court found that Rackman was not an attorney who "*ought* to be called as a witness in the proceeding * * *. The phrase '*ought* to be called as a witness' has been narrowly construed to refer to an attorney 'who has crucial information in his possession which must be divulged' in the course of a trial." *SMI Indus.*, 586 F. Supp. at 817, 223 USPQ at 748 (emphasis in original) (citations omitted).

The district court also concluded that Rackman's testimony was not required on the infringement issue because the file wrapper contains all pertinent information required to determine the scope of the claim. Based upon the above discussion, we hold that the district court did not abuse its discretion in concluding that disqualification of Nealon and Rackman would be inappropriate under Canon 5.

Disqualification under Canon 7

Medtronic claims Telectronics' pleadings demonstrate professional "taint" because Nealon and Rackman omitted claims and defenses that, if included, would have required their withdrawal for ethical considerations. Specifically, Medtronic asserts that Telectronics: (1) omitted the '242 patent from the declaratory judgment action; (2) waived possible legitimate affirmative defenses under 35 U.S.C. § 112 (1982); (3) failed to assert that "new prior art" should have been disclosed to the patent office, thus making Rackman and Nealon parties to a fraud; and (4) used ambiguous pleadings by alleging that the '242 patent is invalid because the invention was anticipated and obvious when made.

The district court found that the omission of the '242 patent from the original complaint could not be viewed as unreasonable in light of Telectronics' successful license defense to the '242 patent in the ITC proceeding. As to Medtronic's remaining arguments concerning the decision of Telectronics' lawyers to prove invalidity of the '242 patent by showing only obviousness based on newly discovered prior art, the district court found that these tactics did not indicate that Telectronics' attorneys were unreasonable or ineffective. "In his representation of a client, a lawyer may * * * [w]here permissible, exercise his professional judgment to waive or fail to assert a right or position of his client." DR 7-101 (B).

Accordingly, the district court did not abuse its discretion in concluding that Rackman and Nealon are entitled to structure the case according to their own professional judgment by selecting the defenses to be made against the '242 patent. Nor did it abuse its discretion in finding no showing that Rackman and Nealon were not vigorous in the representation of their client.

Disqualification under Canon 9

This Canon presents to us, and presented to the district court, the most difficulty. In its Certification Order, the district court stated:

> Whether "former client" status may be accorded to Berkovits is uncertain. However, to permit the same attorneys who had unrestricted access to the inventor, his records, his knowledge and strategy and who undertook the extensive collaboration needed to draft and prosecute his patent application to lead the attack to undermine those efforts and invalidate the resulting patent may taint the underlying trial and damage the integrity of the judicial process.

Certification Order at 15.

The bottom line, however, is that attorneys represent *clients*—not legal positions or patents. Having failed to establish the existence of any attorney-client relationship with itself or Berkovits, Medtronic asks this court to apply the vague standard of an "appearance of impropriety" in the guise of a rule "unique to the practice of patent law," and to disqualify counsel where there is no actual impropriety exhibited. We will not do this. Instead, we will apply the law of the Second Circuit, which like our case law recognizes the trend away from disqualification based solely on an appearance of impropriety. *New York Inst. of Technology* v. *Biosound, Inc.*, 658 F. Supp. 759, 762, 2 USPQ2d 2039, 2041 (S.D.N.Y. 1987) (citing *Armstrong*, 625 F.2d at 446); *accord Ah Ju Steel Co.* v. *Armco, Inc.*, 680 F.2d 751, 754 (CCPA 1982).

Telectronics does concede that it would be unusual to have counsel impeaching their own work product. But that is not this case. Rackman and Nealon's continued representation is subject to the condition that the proof of invalidity of the '242 patent will be limited to prior art that was not known at the time that the application was prosecuted. No change in any position taken during the prosecution of the '242 patent is required to recognize the significance of that art. Similarly, no change in position is required on the infringement issue because Telectronics' allegedly infringing products were not first produced until some time after the issuance of the '242 patent. Although counsel for Telectronics may have to testify when a particular piece of prior art became known to them, patent owners and attorneys are often asked that question during discovery, and no disqualification is required.

The district court stated in the Certification Order that:

> [t]he substantial ground for difference of opinion regarding the September 8 Order is, perhaps, best illustrated by two conflicting district court decisions: [*Hooper* v. *Steelplank Corp.*, 215 USPQ 829 (E.D. Mich. 1981) and *SMI Indus.*]. *Hooper* generally supports Medtronic's position while *SMI* generally supports Telectronics' position.
>
> Notably, in *Sun Studs*, the Federal Circuit adopted, and cited with approval, the reasoning articulated in *Hooper* with respect to attorney disqualification in patent-based disputes.

Certification Order at 12.

Although this court in *Sun Studs* cited with approval the reasoning in *Hooper*, two important factual differences distinguish this case from *Hooper*. There the district court found that (1) the individual was the alter ego of the corporation, and thus, an attorney-client relationship existed; and (2) although a client may waive his right to object to his attorney's representation of adverse interests, the facts did not support a waiver. *Hooper*, 215 USPQ at 831. Here, the district court found that (1) Berkovits was not the alter-ego of AO, and thus, an attorney-client relationship did not exist; and (2) WLT, the successor in interest to AO, had provided a written waiver to Rackman and Nealon's representation.

Under the law of the Second Circuit, these distinctions are crucial. In the Second Circuit, for purposes of Canon 9, the appearance of impropriety by itself is usually not a sufficient basis for disqualification. *See Board of Educ.* v. *Nyquist*, 590 F.2d at 1247; *New York Inst. of Technology*, 658 F. Supp. at 761, 2 USPQ2d at 2041. Only in unusual situations will the appearance of impropriety alone be sufficient to warrant disqualification. *Id.*

> We do not agree that the alleged appearance of impropriety in this case presents the 'unusual' situation in which disqualification on Canon 9 grounds alone is warranted * * *. This is not a case in which an attorney has represented one client and then switched over to his former client's adversary * * *. In addition, any appearance of impropriety is lessened by the fact that [Rackman and Nealon] did not undertake successive representation of clients with adverse interests.

New York Inst. of Technology, 658 F. Supp. at 762–63, 2 USPQ2d at 2041–42. Medtronic, furthermore, made no showing that Rackman or Nealon obtained actual confidences that would give Telectronics an unfair advantage. Although Medtronic asserts that during Berkovits' relationship with Rackman and Nealon, important decisions were made encompassing the scope and content of the prior art, the arguments to be made in support of non-obviousness, and the sufficiency of the disclosure, no specifics of the unfair advantage were set forth before the district court. Medtronic submits, however, that it has no burden to show the existence of specific confidences because the court must *assume* that during the prior representation confidences were disclosed. This assumption might well be valid if there had been a previously existing attorney-client relationship. *See T.C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp 265, 268–69 (S.D.N.Y. 1953). Here the district court found no such relationship existed, and therefore, the assumption is not applicable. Accordingly, the district court did not abuse its discretion.

Conclusion

The district court's extraordinarily careful findings and conclusions are entirely consistent with the Second Circuit's restrained approach towards disqualification, *see United States Football*

League v. *National Football League*, 605 F. Supp. 1448, 1452 (S.D.N.Y. 1985). Thus, the district court did not abuse its discretion in denying Medtronic's motion to disqualify Nealon and Rackman and his firm, subject to the conditions that Telectronics would not raise an issue of fraud or misconduct regarding the prosecution of the '242 patent, and would restrict its proof of obviousness to art discovered subsequent to the issuance of the patent.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

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Decisions of the United States Court of International Trade

(Slip Op. 87–139)

NEC AMERICA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–6–00799S

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

The Customs Service classified certain imported paging receivers as "Other: Solid-state (tubeless) radio receivers * * *. Other" under item 685.24, TSUS. The plaintiff contends that the merchandise is properly classifiable as "indicator panels, * * * and other sound or visual signalling apparatus" under item 685.70, TSUS.

Held: Since plaintiff has not introduced evidence to show that the merchandise was improperly classified, it failed to rebut the presumption of correctness, and the paging receivers were correctly classified as "Other: Solid-state (tubeless) radio receivers: * * *. Other" under item 685.24, TSUS.

[Judgment for defendant; action dismissed.]

(Decided December 18, 1987)

Glad & Ferguson (Edward N. Glad, at the trial and on the brief), for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office *(Saul Davis,* at the trial and on the brief), for the defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Japan, and described on the customs invoice as "paging receivers."

The merchandise was classified by the Customs Service as "Other: Solid-state (tubeless) radio receivers: * * *. Other" under item 685.24 of the Tariff Schedules of the United States (TSUS). Consequently, the merchandise was assessed with duty at a rate of 8.8 per centum *ad valorem.*

Plaintiff protests this classification and contends that the merchandise is properly classifiable under item 685.70, TSUS, as "indicator panels, * * * and other sound or visual signalling apparatus," dutiable at a rate of 3.5 per centum *ad valorem.*

The pertinent statutory provisions of the tariff schedules are as follows:

Classified under:

Schedule 6, Part 5:

Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and television cameras; record players, phonographs, tape recorders, dictation recording and transcribing machines, record changers, and tone arms; all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof:

* * * * * * *

Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and reception apparatus, and parts thereof:

* * * * * * *

Other:

Solid-state (tubeless) radio receivers:

* * * * * * *

685.24 Other .... 8.8% *ad val.*

Claimed under:

Schedule 6, Part 5:

685.70 Bells, sirens, indicator panels, burglar and fire alarms, and other sound or visual signalling apparatus, all of the foregoing which are electrical, and part thereof .... 3.5% *ad val.*

The question presented is whether, within the meaning of the tariff provisions, the imported merchandise is dutiable as "Other: Solid-state (tubeless) radio receivers: * * *. Other," as classified by Customs, or as "indicator panels, * * * and other sound or visual signalling apparatus," as claimed by plaintiff. Since it is the determination of the court that plaintiff has not proven that the imported display pagers were incorrectly classified, the classification of the merchandise as "Other: Solid-state (tubeless) radio receivers: * * *. Other," under item 685.24, TSUS, is sustained.

The merchandise in the present case was the subject of prior customs litigation by the same plaintiff-importer in *NEC America, Inc.* v. *United States,* 8 CIT 184, 596 F. Supp. 466 (1984), *aff'd,* 760 F.2d 1295 (Fed. Cir. 1985). In that case, identical merchandise was also classified as solid-state (tubeless) radio receivers, under item 685.24, TSUS. Plaintiff there also contended that the merchandise was incorrectly classified, and should have been classified as "indicator panels, * * * and other sound or visual signalling apparatus," under item 685.70, TSUS. After an examination of the merchandise, relevant case law, lexicographic definitions, and testimony, the court held that plaintiff failed to overcome the presumption of correctness which attached to the government's classification, and sus-

tained the classification of the merchandise by the Customs Service. Plaintiff appealed to the United States Court of Appeals for the Federal Circuit, and the appellate court affirmed that decision on the basis of the opinion of this court. *NEC America, Inc.* v. *United States,* 760 F.2d 1295 (Fed. Cir. 1985).

The imported paging receivers are described in *NEC America, Inc.* v. *United States,* 8 CIT 184, 596 F. Supp. 466 (1984). In sum, the pager is a small electrical device which alerts users to messages visually displayed on a panel. The pager is battery powered and has liquid crystal diode visual display (LCD) units with a 10-digit capacity. It is pre-set to a certain radio frequency channel and is activated by means of a three-motion switch. When the switch is turned, the pager emits a tone and the liquid crystal display is illuminated to indicate that it is operational.

When reset, the pager is activated by a binary digital code transmitted over the pre-set radio channel. The radio signal is received by the pager, detected, and sent to a decoding device which activates the pager. When activated, the pager generates a tone and presents numerical information on a visual display LCD. The device converts binary information received through the radio frequency into digital information on the LCD. The pager can thereby receive information such as telephone numbers, stock quotations, or coded messages. It also has a memory capability which allows it to store and recall messages.

In *NEC America,* plaintiff's principal contention was that a radio receiver necessarily requires a tuner and an audio amplifier, and, therefore, the imported merchandise could not properly be classified as radio receivers because the articles did not contain either tuners or audio amplifiers. 8 CIT at 186. The court found this argument to be contrary to the common meaning of "radio receiver" as found in lexicographic authorities and relevant case law. *Id.* at 186–91.

In determining whether the imported paging receivers were within the meaning of "radio receivers," as used by Congress in the tariff schedules, the court cited the well-established principle that "[t]he meaning of a tariff term 'is presumed to be the same as its common or dictionary meaning in the absence of evidence to the contrary.' " *Id.* at 186 (quoting *Bentkamp* v. *United States,* 40 CCPA 70, 78, C.A.D. 500 (1952)). In ascertaining the common meaning of "radio receiver," the court reviewed various lexicographic authorities and relevant case law and determined that the basic functions of a radio receiver are selectivity, amplification, and detection. 8 CIT at 190. The expert testimony presented at trial by the defendant was consistent with this definition of radio receiver. *Id.* at 187. In addition, both plaintiff's and defendant's experts agreed that the display pagers perform these functions.

Plaintiff, however, asserted that radio receivers must also have variable tuning and audio amplification. The court noted that the

cases cited by plaintiff in support of its contention dealt with devices "designed to receive commercial radio stations that broadcast to the public at large." *Id.* at 189. The court held, however, that while commercial broadcast receivers would not be practical without tuners and audio amplifiers, "[t]he class of 'radio receivers,' * * * is not limited to entertainment broadcast receivers, and as an *eo nomine* designation, includes all forms of radio receivers." *Id.*

The court also considered plaintiff's contention that the merchandise should have been classified under item 685.70, TSUS, which covers electrical "[b]ells, sirens, indicator panels, burglar and fire alarms, and other sound or visual signalling apparatus," and found it to be without merit. *Id.* at 191. After examining the prior case law, the court indicated that classification under item 685.70, TSUS, was "limited to those articles whose sole purpose and function is merely signalling." *Id.* Hence, the court concluded that the superior capabilities of the display pagers in issue, with their ability to display information in digital form and to retain it for later recall, clearly "transcend mere signalling." *Id.*

Finally, the court concluded that since the imported display pagers "select a frequency, amplify it, and convert radio signals into perceptible signals, *i.e.*, visual digital indications on the LCD," they perform the essential functions of a radio receiver. *Id.* at 190. Consequently, the court held that the display pagers were properly classified by Customs as " 'solid-state (tubeless) radio receivers' under item 685.24, TSUS." *Id.* at 192.

In the present action, plaintiff contends that the court in *NEC America* was in error with respect to the classification of the imported display pagers and maintains that the display pagers are properly dutiable as "indicator panels, * * * and other sound or visual signalling apparatus," under item 685.70, TSUS. NEC again argues that the display pagers cannot properly be classified as radio receivers because they do not contain tuners or audio amplifiers, and that radio receivers necessarily require tuners and audio amplifiers. Furthermore, NEC contends that the inferior heading of "Other: Solid-state (tubeless) radio receivers" is limited by its immediate superior heading to radiobroadcasting apparatus, pursuant to General Headnote 10(c)(i), TSUS.

In order to prevail in this action plaintiff must present clear and convincing evidence to prove that the court's decision in *NEC America* was erroneous. *See Bar Zel Expediters, Inc.* v. *United States,* 3 CIT 84, 90, 544 F. Supp. 868, 873 (1982), *aff'd,* 698 F.2d 1210 (Fed. Cir. 1983); *M.L. de Lange* v. *United States,* 76 Cust. Ct. 33, 38, C.D. 4631 (1976). If plaintiff does not show that the display pagers were improperly classified, the court must decide whether the holding of the *NEC America* decision should be followed under the doctrine of *stare decisis.* The following statement on the application of *stare decisis,* found in the case of *United States* v. *Dodge &*

Olcott, Inc., 47 CCPA 100, C.A.D. 737 (1960), is equally applicable here:

> While we always are open to consider any proper and pertinent matters which bear upon the issue of possible error in an earlier decision, such matters when presented must be clear and convincing. It is unfair both to the courts and to the parties litigant that there be a readjudication of issues previously determined except upon a clear and convincing showing of error. This requirement is not satisfied by a reargument of the former issues on the same or a merely cumulative record.

Id. at 103; *see also Bar Zel Expediters,* 3 CIT at 90, 544 F. Supp. 873.

In this case, it cannot be doubted that the plaintiff has not made a clear and convincing showing that the holding of *NEC America* was erroneous. NEC contends that the tariff item for solid-state (tubeless) radio receivers does not encompass radiotelegraphic or radiotelephonic receivers, because the superior heading divides radiotelegraphic and radiotelephonic receivers from radiobroadcasting and television receivers with a semicolon. NEC submits that "inferior heading for 'other solid-state (tubeless) receivers' is limited by its immediate superior heading to radiobroadcasting receivers," by virtue of General Interpretative Rule 10(c)(i), TSUS, which provides that an inferior heading cannot enlarge its superior heading.

NEC's interpretation of the tariff schedules is not supported by either the statutory language, or the General Interpretative Rules. It is clear from an examination of the tariff schedules that there is only one main superior heading rather than two, as contended by NEC. Hence, item 685.24 encompasses radiotelegraphic and radiotelephonic apparatus, as well as, radiobroadcasting apparatus. If the tariff schedules were interpreted as NEC contends, there is no inferior heading that encompasses radiotelegraphic and radiotelephonic apparatus, and, therefore, there would be no tariff item which would provide for duties on the imported paging receivers. Plaintiff's suggested interpretation of the tariff schedules would render the specification of radiotelegraphic and radiotelephonic apparatus superfluous, and violate the presumption that Congress has not used superfluous words. *See Ameliotex, Inc.* v. *United States,* 65 CCPA 22, 25, C.A.D. 1200, 565 F.2d 647, 677 (1977).

Furthermore, the main superior heading to item 685.24, cannot be interpreted as being divided into two sections by a semicolon, as this grammatical construction of the statute would "bring[ ] an anomalous result contrary to the manifest intention of Congress * * *." *See L.R. Markell* v. *United States,* 16 Ct. Cust. App. 518, 520 (1929). Hence, the court must give effect to the legislative intent that the provision for "Other: Solid-state (tubeless) radio receivers: * * *. Other," item 685.24, TSUS, was to encompass all the categories of radio receivers listed in the main superior heading.

NEC again contends that the imported display pagers are not within the common meaning of "radio receiver," because that term

encompasses more than just the functions of selectivity, amplification and detection. In support of its contention NEC presented the testimony of experts who testified that a receiver which performs the functions of selection, amplification, and detection is not necessarily a solid-state (tubeless) radio receiver, as it must also have a tuner and audio amplifier. With the exception of this expert testimony, there was no other support for plaintiff's position, which was considered and rejected by the court in *NEC America*. Hence, plaintiff's expert testimony does not constitute a clear and convincing showing of error. It is not questioned that the opinions of experts are relevant in determining the common and commercial understanding of a tariff term. This testimony, however, is advisory only, and unsupported assertions and opinions are no more probative when reiterated than when first offered for the consideration of the court. *See Toyota Motor Sales, U.S.A., Inc.* v. *United States*, 7 CIT 178, 183–84, 585 F. Supp. 649, 654 (1984), *aff'd*, 753 F.2d 1061 (Fed. Cir. 1985).

For the first time, NEC contends that radio receivers must operate on a "real time," or instantaneous basis, rather than transmit a message that has been decoded in a memory to make it perceptible to the user, as with the display pagers in the case. Apart from the opinions of NEC's experts, this contention is unsubstantiated by any authoritative source. No lexicographic definition imposes such a limit on the term radio receiver. Furthermore, as indicated by the defendant, plaintiff's position or assertion is contrary to several types of devices which are commonly considered radio receivers. The examples given included Lotus broadcast and telegraphic radio receivers, some Telex telegraphic radio receivers, and Muzak broadcast radio receivers.

Finally, NEC asserts that the display pagers would be more appropriately classified as "indicator panels, * * * and other sound or visual signalling apparatus," because they are primarily indicator panels which signal the user. NEC submits that the memory capabilities of these display pagers are merely subsidiary functions of the device. This argument ignores the fact that, beyond the additional ability of these devices to store and recall information, the pagers communicate information from one point to another. As indicated in *NEC America*, these capabilities transcend the function of signalling or alerting the user of an abnormal or unusual circumstances. *See* 8 CIT at 191. Merchandise, such as the display pagers in this case, which does more than signal the user is not classifiable as "signalling apparatus." *Cf. United States* v. *Flex Track Equipment Ltd.*, 59 CCPA 97, 100, C.A.D. 1046, 458 F.2d 148, 151 (1972).

In sum, NEC has not made a clear and convincing showing of error in the holding of *NEC America*. Although plaintiff has established a more expansive record by presenting additional expert testimony, plaintiff did not rebut the presumption of correctness of the government's classification. Moreover, defendant did not merely re-

ly on the statutory presumption of correctness that prevails in customs classification cases. It introduced persuasive expert testimony to refute the testimony of plaintiff's witnesses, and to prove that the merchandise was properly classified by Customs. *See NEC America, Inc.* v. *United States,* 8 CIT at 190–191, 596 F. Supp. at 471.

It is the determination of the court that the holding in *NEC America* is not clearly erroneous, and that under the doctrine of *stare decisis,* is a binding precedent in the present action. Hence, the government's classification of the display pagers as "Other: Solid-state (tubeless) radio receivers * * *. Other," under item 685.24, TSUS, is sustained. Judgment will issue accordingly.

(Slip Op. 87–140)

THE NATIONAL BONDED WAREHOUSE ASSOCIATION, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 87–02–00270

[Defendant's motion to dismiss is granted.]

(Dated December 23, 1987)

Sandler & Travis (Thomas G. Travis) for plaintiffs.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, United States Department of Justice *(Michael P. Maxwell)* for defendants.

OPINION

RESTANI, *Judge:* Plaintiffs have filed suit under 28 U.S.C. § 1581(i) (1982) seeking to have regulations setting bonded warehouse annual fee rates for 1985 and 1986 declared invalid. The regulations governing audit and inspection of bonded warehouses were first promulgated in 1982. Defendants claim that the fees assessed in connection therewith could have been challenged by way of administrative protest under 19 U.S.C. § 1514 (1982 & Supp. III 1985) with subsequent judicial review of a denial of protest under 28 U.S.C. § 1581(a) (1982).

It has been repeatedly held by this court that if there is an adequate remedy under 28 U.S.C. § 1581(a), jurisdiction will not lie under 28 U.S.C. § 1581(i), the residual jurisdiction provision. "That plaintiff failed to utilize the adequate and effective procedure originally available to it under section 1581(a) does not render such remedial procedure manifestly inadequate." *Star Sales Distributing Corp.* v. *United States,* 10 CIT ——, 663 F. Supp. 1127, 1130 (1986).

The key to resolution of this dispute is 19 U.S.C. § 1514(a) which sets forth subject matter categories giving rise to decisions that may be protested, and thus determines what may be challenged under 28

U.S.C. § 1581(a). The third category of § 1514(a) reads: "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." 19 U.S.C. § 1514(a)(3). The plain language of the statute would appear to include annual warehouse fees, but plaintiffs have cited two cases which appear to limit this language. They are *Puget Sound Freight Lines, et al.* v. *United States,* 36 CCPA 70, 173 F.2d 578 (1949) and *Atlantic Transport Co.* v. *United States,* 5 Cust. Ct. App. 373 (1914).

Apparently the particular language in § 1514(a)(3) which is at issue has remained virtually unchanged since the turn of the century. Congress is presumed to be aware of, and to adopt, judicial interpretations of a statute when it re-enacts that statute without change. *Lorillard* v. *Pons,* 434 U.S. 575, 580–81 (1978). On the other hand, the statute is not structured in quite the way it was at the times of the two cases cited and the related jurisdictional scheme is much altered. None of the changes, however, appear to directly affect the language at issue and defendants have cited no legislative history specifically referencing any desire to overrule the two cited cases. At least for the sake of argument, the court will assume that Congress intended these judicial interpretations to apply despite the surrounding statutory changes.

In *Puget Sound* the challenged fees were assessed on vessels in connection with entry and clearances. The court relied in part for its interpretation of the scope of protestable matters on the jurisdiction of the Customs Court, 36 CCPA at 73–78, 173 F.2d at 580–84, which was more limited than is that of this court. The court states its opinion that "fees, exactions, or charges which bear no relation to the importation of merchandise and the rate of duty resulting from such classification are not, as contended by appellants, 'exactions of whatever character (within the jurisdiction of the Secretary of the Treasury)' within the meaning of section 514 of the Tariff Act of 1930." 36 CCPA at 78, 173 F.2d at 584.

Puget Sound also discusses *Atlantic Transport* which involved fees for services of inspectors in supervising the loading of a vessel with merchandise on which drawback was claimed.[1] The court found no jurisdiction, stating "the purpose [of the statute] was to restrict this language to cases which had relation to imported merchandise." 5 Cust. Ct. App. at 376. Like the court in *Puget Sound,* the *Atlantic* court referred to the jurisdiction of the reviewing bodies in concluding that the purpose of the statutory scheme was "to provide a remedy for persons paying fees, charges, and exactions other than duties in connection with imported merchandise." *Id.* The *Atlantic* court viewed the charge as relating to export, noting that "importation is complete." 5 Cust. Ct. App. at 374.

[1] Drawback generally concerns the refund, upon exportation, of certain monies previously paid upon importation of merchandise, due to the use made of such merchandise. *See* 19 U.S.C. § 1313 (1982 & Supp. III 1985); 19 C.F.R. § 191.2(a) (1986). The drawback in *Atlantic Transport* involved "certain articles manufactured in the United States, and on which the exporter had filed claims for drawback of the duty paid upon the imported materials entering into the manufacture of such articles." *Atlantic Transport,* T.D. 33,979, 25 Treas. Dec. 608, 609 (1913).

In this case fees are charged warehouse owners in connection with supervision by customs officials of receipt of merchandise into bonded warehouses and withdrawal of imported merchandise from bonded warehouses. 19 U.S.C. §§ 1551 and 1646a (1982). Duties are not generally payable while the merchandise is in the warehouse. 19 U.S.C. § 1557(a) (1982). Thus, the annual warehouse fees, although they are not paid directly by importers, clearly "bear * * * relation to the importation of merchandise," *Puget Sound*, 36 CCPA at 78, 173 F.2d at 584, and are paid "in connection with imported merchandise," *Atlantic*, 5 Cust. Ct. App. at 376.[2]

As merchandise in bonded warehouses is in the importation process, it is not difficult to distinguish this case from *Atlantic*. The facts of *Puget Sound* are even more clearly distinguishable. As the lower court decision in *Puget Sound* spells out, the charges there were not related to the importation of merchandise. *Puget Sound Freight Lines, et al.* v. *United States*, 19 Cust. Ct. 70, 74 (1947). This court is faced, however, with language in both *Puget Sound* and *Atlantic* that in its broadest sense would seem to restrict the meaning of the words "charge or exaction of whatever character" in ways those courts could not have intended. The *Puget Sound* appellate court cites with approval the lower court's reasoning which drew a distinction between (1) disputes as to whether fees assessed by Customs on packed packages were for storage disputes over charges in connection with inspection during unlading of vessels and disputes involving charges for cartage from a vessel; and (2) challenges to various clearance and entry fees on vessels. *Puget Sound*, 36 CCPA at 73, 173 F.2d at 580. The basis for the distinction apparently was that the former class of disputes involved charges made in connection with imported merchandise while the latter did not. *Id.* The fees at issue here seem very similar to fees for storing or sampling of packed packages or inspection fees incurred during unlading of vessels bearing imported merchandise. In addition, one of the problems facing the court in *Puget Sound* was the fact that the fees assessed were not within the jurisdiction of the Treasury Department when the relevant language first appeared in the statute. 36 CCPA at 76, 173 F.2d at 582–83.

The *Atlantic* court's emphasis on exportation and its seeming acceptance of cases which involve assessment of certain other fees in connection with imported goods (although the fees do not seem to be any more related to classification or rates of duty than the fees at issue here) render it limited support for plaintiff's position. *See Atlantic*, 5 Cust. Ct. App. at 376 (discussing *American Express Co.*, T.D. 27,962, 13 Treas. Dec. 286 (1907)).

The holdings of *Puget Sound* and *Atlantic* do not compel the court to accept plaintiffs' view. To the contrary, in order to interpret 19 U.S.C. § 1514(a) as plaintiffs wish, the court would have to extend *Puget Sound* and *Atlantic* beyond their holdings. Congress should

[2] 19 U.S.C. § 1514(c)(1)(B) generally allows "any person paying any charge or exaction" to file a protest.

be held to adopt extensions of judicial precedent that are contrary to plain language only if they are necessary to make sense of the statutory scheme. There is no limitation on the court's jurisdiction which requires the court to adopt plaintiffs' interpretation in order to harmonize the statutes nor does acceptance of the plain language create any other significant incongruities.

In the area of adjudication of disputes under the customs laws Congress has expressed a desire that a wide variety of disputes be resolved in an orderly manner via administrative protest. *See* U.S.C. § 1514. As a result, substantial judicial and other governmental resources are preserved. The provisions of section 1514(a) should not be read narrowly so as to escape the system of review or to prevent reviewability. *Cf. United States* v. *Priority Products,* 793 F.2d 296, 299–300 (Fed. Cir. 1986). Because validity, as well as implementation, of regulations is at issue, at first glance section 1581(a) may not appear to be a proper remedy. The protest mechanism, however, is available to resolve all types of legal and factual disputes. *See United States* v. *A.N. Deringer, Inc.,* 66 CCPA 50, 55–56, 593 F.2d 1015, 1020–21 (1979). Of course, interpretation of section 1514(a) so as to include challenges to annual fees appears more appropriate if one considers the types of disputes which might arise. For example, under the 1986 tiered annual fee structure, one might put at issue a narrow factual question such as the number of entries made at a particular warehouse. *See* 50 Fed. Reg. 50032 (Dec. 6, 1985).

The language of section 1514(a) is broad enough to encompass questions involving annual warehouse fees. Furthermore, sound policy reasons reflected in the statutory scheme indicate section 1514(a) should not be excessively narrowed. The cases cited which interpret earlier statutes, do not limit section 1514(a) to the extent argued by plaintiffs.

As the annual fees at issue have already been assessed, time is not of the essence. Thus, the usual reason for finding section 1581(a) inadequate where it might otherwise apply, and for assuming jurisdiction under 28 U.S.C. § 1581(i), rather than 28 U.S.C. § 1581(a), is absent.

As no additional reason for finding section 1581(a) inadequate has been proffered, the court finds that it was an available remedy. An adequate remedy exists under section 1581(a) and therefore jurisdiction does not lie under section 1581(i).[3] Accordingly, the motion to dismiss is granted.

[3] A companion suit, *White Rose Distributing Co., Inc.* v. *United States,* Court No. 87–02–00268, has been filed in which both parties concur that jurisdiction exists to challenge the annual warehouse fees under 28 U.S.C. § 1581(a).

(Slip Op. 87-141)

UNITED STATES, PLAINTIFF *v.* AMERICAN MOTORISTS INSURANCE CO., AND HAITIAN AMERICAN SEASHELLS, DEFENDANTS

Court No. 86-05-00675

(Dated December 23, 1987)

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Civil Division, United States Department of Justice *(Barbara M. Epstein)* for plaintiff.

Russotti and Barrison (Harvey Barrison) for defendants.

OPINION

RESTANI, *Judge:* This suit against the principal and surety on certain customs bonds is before the court on the cross-motions for summary judgment of the United States and the surety.

FACTS

In the summer of 1980, Haitian American Seashells (HAS) entered conch meat into the United States. The Food and Drug Administration (FDA), following procedures which have not been challenged, issued a Notice of Refusal of Admission on August 29, 1980. The notice indicated that HAS had 90 days to export the merchandise under United States Customs Service (Customs) supervision. The merchandise was found to be decomposed.

Liquidation of the two relevant entries occurred on August 4, 1980 and September 3, 1980. On September 15, 1980, Notice of Redelivery as to both entries was issued by Customs. The notice included a "remark" that the merchandise was to be exported or destroyed under Customs' supervision by November 12, 1980. Defendant does not argue that HAS complied in any manner with either the order of the FDA or the order of Customs.

On November 24, 1980, demands for liquidated damages of $21,743.00 were sent to HAS. On April 23, 1982, a demand was made on American Motorists Insurance Co. (AM) for the same amount. AM is the surety on the two bonds covering the entries at issue. On January 25, 1983, AM filed a "Petition for Relief" with Customs. On March 1, 1984 the petition was denied.

DISCUSSION

Plaintiff's first argument is that the demand for liquidated damages is a protestable decision and that AM may not raise any defenses to the claim for such damages because protest was not filed within 90 days of the demand. 19 U.S.C. § 1514 (1982 & Supp. III 1985). Plaintiff cites in support section 1514(a)(3) indicating that "all charges or exactions of whatever nature within the jurisdiction of the Secretary of the Treasury" are subject to protest, and various cases which are not directly on point.

Plaintiff has cited scant authority for the proposition that the type of defenses raised here must be resolved via the protest mechanism. In fact in its reply brief plaintiff, in effect, requests the court to decide this case on other grounds. The court accedes to that request.

The first preliminary dispute which should be resolved is whether plaintiff may sue only under Paragraph 4 of the bonds[1] which refers to failure to redeliver, or whether it may also sue under Paragraph 7 of the bonds[2] which refers to failure to comply with laws governing admissibility into U.S. commerce. Defendant argues that although the demand letters do not cite Paragraph 4, they refer only to failure to redeliver and not failure to comply with admissibility laws. Here, this appears to be a distinction without a great difference. The notices to redeliver were based on the inadmissibility of the merchandise under laws administered by FDA and, as indicated, there was no compliance with FDA's refusal to admit notice. As no facts are relevant to a claim under Paragraph 7 which are not already a part of the dispute underlying the claim under Paragraph 4, there is no prejudice to allowing plaintiff to proceed on both its theories. Indeed, defendant has anticipated this result and has briefed both approaches.

In connection with the dispute, defendant argues that the plaintiff ignores vital differences between the two provisions. Defendant argues that suit is possible only under Paragraph 4 if all of the merchandise at issue is tainted. In other words, defendant asserts that Paragraph 7 is limited to partially adulterated shipments. As noted by defendant, *United States* v. *India Food and Gourmet,* 9 CIT 171, 176 (1985) appears to hold otherwise. Furthermore, *United States* v. *Toshoku America, Inc.,* 11 CIT ——, 670 F. Supp. 1006, 1010 (1987), *aff'd on rehearing,* No. 84-11-01590 (CIT, Dec. 1, 1987) discussed this issue in some detail and rejected defendants' argument. Paragraph 7 is clearly designed for matters such as FDA refusals to admit. Paragraph 4 primarily refers to matters within Customs ordinary purview. *See Id.* at 1009–10. When Customs issues a notice of redelivery, an FDA matter becomes the subject of Paragraph 4. Although Paragraph 7 seems to be geared chiefly to situations where

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[1] Paragraph 4 of the bonds reads:

(4) And if in any case the above-bounden principal shall redeliver or cause to be redelivered to the order of the collector of customs, on demand by him, in accordance with the law and regulations in effect on the date of the release of said articles, any and all merchandise found not to comply with the law and regulations governing its admission into the commerce of the United States, unless before such demand the said principal shall have filed with the collector of customs a superseding bond on customs Form 7601 in which the actual owner whose declaration has been filed pursuant to section 485(d), Tariff Act of 1930, shall have undertaken upon proper demand on such owner to effect such redelivery; or, in default of redelivery after a proper demand on him, the above-bounden principal shall pay to the said collector such amounts as liquidated damages as may be demanded by him in accordance with the law and regulations, not exceeding the amount of this obligation, for any breach or breaches thereof;

[2] Paragraph 7 of the bonds reads:

(7) And if in the case of any and all merchandise found not to comply with the law and regulations governing its admission into the commerce of the United States, the above-bounden principal after proper notice shall mark, label, clean, fumigate, destroy, export, and do any and all other things in relation to said merchandise that may be lawfully required, and shall hold the said merchandise for inspection and examination, unless the said principal shall have filed with the district director of customs a bond on customs Form 7601 in which the actual owner whose declaration has been filed pursuant to section 485(d) shall have undertaken after proper notice to mark, label, clean, fumigate, destroy, export, and do any and all other things in relation to the said merchandise that may be lawfully required, and to hold the said merchandise for inspection and examination; or in default thereof, shall pay to the district director of customs as liquidated damages an amount equal to the value of the merchandise with respect to which there has been a default, set forth in the entry, plus the estimated duties thereon, as determined at the time of entry;

some merchandise may be rehabilitated, its wording is quite broad. Contrary to defendant's arguments, although Paragraphs 4 and 7 have different basic purposes, it is possible that some fact situations may give rise to liability under both.

The essence of AM's defense is that final liquidations determined full liability under the bonds for the entries at issue. This issue was addressed in two recent cases in this court. One is *United States* v. *Utex International, Inc.*, 11 CIT ——, 659 F. Supp. 250 (1987) *appeal docketed*, No. 87-1414 (Fed. Cir. June 24, 1987). The other is *Toshoku.*

Utex is particularly helpful as to one of the claims as it discusses liability under Paragraph 7 in the context of refusal of admission by FDA following liquidation. One of the two entries at issue here met this fact pattern. Contrary to plaintiff's assertion, *Utex* is not *stare decisis:* it is on appeal.[3] It is, however, instructive. The court found, in essence, that liquidation does not bar Customs' enforcement of other agencies' orders intended to prevent adulterated matter from entering into the commerce of the United States. That is, liquidation is binding as to matters which are within Customs' jurisdiction, but the finality effects of liquidation did not bar actions to enforce decisions within FDA's jurisdiction. The court concluded that if liquidation damages could not be collected under the bond there would be little incentive to comply with orders by FDA that are not issued in advance of liquidation.

Toshoku is instructive as to the remaining entry. In *Toshoku* FDA's refusal to admit occurred before liquidation. The result was similar to that of *Utex*. There seems little point in repeating the relevant discussion contained in *Toshoku* and *Utex,* nor does there seem to be a reason to reject the recent reasoning of this court on the essential issues involved here.[4]

The only way of distinguishing this case from *Toshoku* and *Utex* is based on the fact that the demand for liquidated damages cited failure to redeliver rather than failure to obey the FDA's refusal to admit order. As indicated, as distinguished from those cases which involve decisions under the Customs laws, the notice to redeliver here was based on FDA's refusal to admit and that basis was made clear in the redelivery notice and in the subsequent demands. Thus, there is no significant ground for disregarding *Toshoku* and *Utex.*

There is no dispute that the goods at issue were found inadmissible by FDA. There is no dispute that defendant received notices of refusals to admit which were not obeyed or challenged; there is no dispute that Customs issued notices to redeliver based on FDA's finding, which notices were not heeded or challenged; and there is no dispute that suit was brought which involves the basic fact of failure to comply with the refusal to admit. All of the events occurred promptly, although as to one entry the notice of refusal to

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[3] The time to appeal in *Toshoku* has not yet run.
[4] The court finds unnecessary to its decision that part of *Toshoku* that discusses 19 C.F.R. § 113.62 (1986).

admit occurred after liquidation.[5] As indicated by *Utex*, premature liquidation is not, by itself, a defense in this type of case. Accordingly, the bonds were breached.

Plaintiff also seeks prejudgment interest. Defendant argues that this is a penalty case and prejudgment interest may not be awarded on penalties. True liquidated damages are not penalties. They are compensatory in nature, providing a measure of recovery when it appears at the time a contract is made that damages caused by breach will be difficult or impossible to estimate. *See Rex Trailer Co., Inc.* v. *United States,* 350 U.S. 148, 153–4 (1955); *Priebe & Sons, Inc.* v. *United States,* 332 U.S. 470, 411 (1947). As was held in *United States of America* v. *Imperial Food Imports,* No. 87-1330 (Fed. Cir., December 8, 1987) reasonable liquidated damages resulting from failure to heed FDA notices of refusal to admit and resulting Customs redelivery notices are not penalties. In cases such as this, there is no way to accurately assess damage to the government when adulterated food enters into the commerce of the United States in violation of bond provisions. Thus, liquidated damages are provided for in the bond. That liquidated damages may encourage proper performance does not translate them into penalties.

The court has certain discretion in awarding pre-judgment interest. *Id.* The issues in this case are complex and there seems to have been no clear precedent involving the issues raised by plaintiff until very recently. Furthermore, suit was not filed by plaintiff until almost six years after the events at issue. Although the court did not find any actions by Customs a defense to liability, some of its actions, such as failure to suspend liquidation, may have misled the defendants into miscalculating liability. Under the particular facts of this case, prejudgment interest shall be assessed from the date of suit, June 3, 1986. The rates specified in section 6621 of the Internal Revenue code shall apply. *Id.* Postjudgment interest is allowed in accordance with 28 U.S.C. § 1961 (1982). Plaintiff shall prepare a proposed judgment and present it to the court within 10 days hereof.

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[5] Plaintiff argues that it may sue base on simple failure to obey a notice to redeliver because its notice of redelivery was timely. The notice was sent within 90 days of liquidation. As indicated, the liquidation became final. The court does not reach the issue of whether Customs could have demanded redelivery at the time it did if this case had not involved an FDA refusal to admit. *See* 19 C.F.R. § 141.113(f) (1986).

(Slip Op. 87–142)

JOSE G. FLORES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87–02–00231

Before DICARLO, *Judge.*

[Action dismissed for lack of jurisdiction.]

(Decided December 29, 1987)

Peter S. Herrick, for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office *(Michael P. Maxwell),* for defendant.

Plaintiff, a customhouse broker, brings this action to recover $7,071.00 paid to the United States Customs Service (Customs) to mitigate a $14,085.00 penalty. Defendant moves to dismiss the action for lack of jurisdiction and for failure to state a claim upon which relief can be granted. The Court finds that is lacks jurisdiction and dismisses the action.

Pursuant to plaintiff's request on behalf of Goya de P.R., Inc. (Goya) for correct classification of peach concentrate, Customs issued a ruling that such merchandise was classifiable under item 152.88, Tariff Schedules of the United States (TSUS), dutiable at 15% *ad valorem.* Notwithstanding this ruling, Goya, under the name Tradewind Food, Inc., later entered peach concentrate valued at $14,085.00 as duty free.

Goya received a pre-penalty notice for fraudulent entry of the peach concentrate as duty free. Subsequently, Customs issued a penalty notice in the amount of $14,085.00. Plaintiff filed a petition to cancel or mitigate the penalty claiming that the failure to enter the merchandise as dutiable was caused by clerical error and not fraud. Customs mitigated the penalty to $7,071.00 on the basis that failure to use the correct classification was due to gross negligence, not fraud.

Pursuant to 19 C.F.R. § 171.33(a) (1985), plaintiff filed a supplemental petition for further mitigation which was denied. After paying the mitigated amount as required by 19 C.F.R. § 171.33(c) (1985), plaintiff filed a second supplemental petition for further mitigation. 19 C.F.R. § 171.33(c) provides that a second supplemental petition "will not be accepted unless accompanied or preceded by full payment of all penalties * * * determined to be due in the decision rendered on the first supplemental petition." Customs denied the second supplemental petition, and plaintiff then filed this action.

Plaintiff argues this Court has jurisdiction under 28 U.S.C. § 1581(i)(4) (1982) and 19 U.S.C. § 1592(e) (1982) to hear its challenge seeking return of the mitigated amount paid to Customs. The Court disagrees.

Section 1581(i)(4) provides this Court jurisdiction over the "administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of [subsection (i)] and subsections (a)–(h) of

[28 U.S.C. § 1581]." The Court finds, however, that an action for return of monies paid as mitigation of a penalty imposed by Customs does not fall within paragraphs (1)–(3) of subsection (i) nor is it part of the administration or enforcement of matters referred to in such paragraphs or in subsections (a)–(h) of 28 U.S.C. § 1581 (1982 & Supp. III 1985). *See ITT Semiconductors* v. *United States*, 6 CIT 231, 237–38, 576 F. Supp. 641, 646 (1983).

Nor does this Court have jurisdiction under subsection (e) of 19 U.S.C. § 1592. That subsection is not a jurisdictional provision but rather sets out the applicable procedure to be followed in an action the United States commences in this Court pursuant to the jurisdictional provision 28 U.S.C. § 1582 (Supp. III 1985) to recover a monetary penalty claimed under 19 U.S.C. § 1592. *See McCarthy* v. *Heinrich*, 11 CIT ——, Slip Op. 87–120, at 2–3 (Nov. 2, 1987). Since the United States has not commenced an action to recover a monetary penalty under 19 U.S.C. § 1592, this Court does not have jurisdiction under 28 U.S.C. § 1582.

The Court dismisses this action for lack of jurisdiction. So ORDERED.

ABSTRACTED CLASSIFICATIO

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	Iten
C87/218	Watson, J. December 11, 1987	W.R. Filbin & Co.	86-3-00386	Item 660.71 4%	Item Fre
C87/219	Watson, J. December 11, 1987	John V. Carr & Sons, Inc.	86-3-00387	Item 660.71 4%	Item Fre
C87/220	Tsoucalas, J. December 16, 1987	Lou Taylor	85-6-00764	Item 656.25 25%, 23.1%, 21.3%, 19.4%, 17.5%	Item 8.5 7.3
C87/221	Tsoucalas, J. December 16, 1987	Zayre Corp.	86-6-00794	Item 684.24 8%	Item 4.5
C87/222	Restani, J. December 17, 1987	RRF Industries, Inc.	84-8-01190, etc.	Merchandise classified as other wearing apparel in Schedule 3, Part 6, Subpart F	Item 13.
C87/223	Re, C.J. December 18, 1987	Belwith Int'l Inc.	78-6-01206	Item 546.54 Various rates	Item Va
C87/224	Re, C.J. December 18, 1987	Belwith Int'l Inc.	79-4-00573	Item 546.54 Various rates	Item Va
C87/225	Re, C.J. December 18, 1987	Belwith Int'l Inc.	79-9-01380	Item 546.54 Various rates	Item Va

ON DECISIONS

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
em No. and rate		
n 660.64 ree of duty	Agreed statement of facts	Detroit Gray cast iron engine parts
n 660.64 ree of duty	Agreed statement of facts	Detroit Gray cast iron engine parts
n 745.68 5%, 8.1%, 7.7%, 3%, 6.9%	Agreed statement of facts	Miami Clasps or parts thereof
n 678.50 5%	U.S. v. Texas Instruments, Inc., Appeal No. 81-23	Boston Combination radios with electronic clocks
n 376.56 3.5% or 16.5%	Izod Outerwear v. U.S., S.O. 85-72	New York Wearing apparel
n 548.05 arious rates	Agreed statement of facts	Los Angeles Glass Balls and glass knobs
n 548.05 arious rates	Agreed statement of facts	Los Angeles Glass balls and glass knobs
n 548.05 arious rates	Agreed statement of facts	Los Angeles Glass balls and glass knobs

ABSTRACTED CLASSIFICATION DE

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	It
C87/226	Re, C.J. December 18, 1987	Belwith Int'l Inc.	80-3-00429	Item 546.54 Various rates	Iten V
C87/227	Re, C.J. December 18, 1987	Belwith Int'l Inc.	81-4-00380	Item 546.54 Various rates	Iten V
C87/228	Re, C.J. December 21, 1987	Belwith Int'l Inc.	83-4-00556	Item 546.54 Various rates	Iten V
C87/229	Re, C.J. December 21, 1987	Belwith Int'l Inc.	83-4-00617	Item 546.54 Various rates	Iten V
C87/230	Re, C.J. December 21, 1987	Belwith Int'l Inc.	83-10-01409	Item 546.54 Various rates	Iten V
C87/231	Re, C.J. December 21, 1987	Belwith Int'l Inc.	84-3-00365	Item 546.54 Various rates	Iten V
C87/232	Re, C.J. December 21, 1987	Belwith Int'l Inc.	86-8-01017	Item 546.54 Various rates	Iten V
C87/233	Re, C.J. December 21, 1987	Belwith Int'l Inc.	86-11-01435	Item 546.54 Various rates	Iten V
C87/234	Re, C.J. December 21, 1987	Belwith Int'l Inc.	87-4-00610	Item 546.54 Various rates	Iten V
C87/235	Re, C.J. December 22, 1987	Belwith Int'l Inc.	82-3-00348	Item 546.54 Various rates	Iten V
C87/236	Re, C.J. December 22, 1987	Belwith Int'l Inc.	82-9-01330	Item 546.54 Various rates	Iten V

ECISIONS — Continued

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
tem No. and rate		
em 548.05 Various rates	Agreed statement of facts	Los Angeles Glass balls and glass knobs
m 548.05 Various rates	Agreed statement of facts	Los Angeles Glass balls and glass knobs
m 548.05 Various rates	Agreed statement of facts	Los Angeles Glass balls and glass knobs
m 548.05 Various rates	Agreed statement of facts	Los Angeles Glass balls and glass knobs
m 548.05 Various rates	Agreed statement of facts	Los Angeles Glass balls and glass knobs
m 548.05 Various rates	Agreed statement of facts	Los Angeles Glass balls and glass knobs
m 548.05 Various rates	Agreed statement of facts	Los Angeles Glass balls and glass knobs
m 548.05 Various rates	Agreed statement of facts	Los Angeles Glass knobs and glass balls
n 548.05 Various rates	Agreed statement of facts	Los Angeles Glass balls and glass knobs
n 548.05 Various rates	Agreed statement of facts	Los Angeles Glass balls and glass knobs
n 548.05 Various rates	Agreed statement of facts	Los Angeles Glass balls and glass knobs

C87/237	DiCarlo, J. December 22, 1987	Izod Outerwear	81-5-00675	Item 546.54 Various rates
C87/238	Re, C.J. December 23, 1987	New York Merchandise Co.	82-1-00048	Item 206.98 5.1%
C87/239	DiCarlo, J. December 23, 1987	Endicott Johnson Corp.	85-8-01132, etc.	Item 700.57 37.5%
C87/240	DiCarlo, J. December 23, 1987	Endicott Johnson Corp.	85-10-01414, etc.	Item 700.57 37.5%
C87/241	DiCarlo, J December 23, 1987	Farwest Garments, Inc.	85-11-01680	Item 383.90 21¢ per lb. + 27.5%
C87/242	Tsoucalas, J. December 23, 1987	H-G Industries, Inc.	87-2-00431	Item 683.70 27.5%
C87/243	DiCarlo, J. December 28, 1987	Izod Ltd.	85-2-00290	Item 380.84 $0.25¢ per lb. + 27.5% Item 379.95 $0.23 per lb. + 27.5%
C87/244	Tsoucalas, J. December 28, 1987	Fernseh, Inc.	85-3-00418	Item 722.52 13.9%
C87/245	Re, C.J. December 29, 1987	Belwith Int'l Inc.	79-4-00571	Item 546.54 Various rates
C87/246	Re, C.J. December 29, 1987	Sangamo Capacitor	85-10-01352, etc.	Merchandise classified as electrical capacitors, fixed or variable at 10%

Item 548.05 Various rates	Agreed statement of facts	New York Wearing apparel
Item A203.30 Free of duty	Agreed statement of facts	San Diego Woven wood ashtrays
Item 700.56 6%	Agreed statement of facts	Minneapolis Athletic footwear
Item 700.56 6%	Agreed statement of facts	New York Athletic footwear
Item 376.56 12.1%	Pacific Trail Sportswear v. U.S., 5 CIT 203 & Izod v. U.S., S.O. 85–72	Tacoma Unisex jackets
Item 737.95 9.6%	Agreed statement of facts	New York Toy articles
Item 376.56 13.5%	Izod Outerwear v. U.S., S.O. 85–72	New York Wearing apparel
Item 685.19 4.5%	Agreed statement of facts	New York Digital CCD film scanner
Item 548.05 Various rates	Agreed statement of facts	Los Angeles Glass balls and glass knobs
Item A516.94 or A656.15 Free of duty	Sangamo Capacitor v. U.S., 779 F.2d 30 (1985)	Greenville-Charleston Silvered mica plates

ABSTRACTED CLASSIFICATION

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and rate
C87/247	Re, C.J. December 29, 1987	Sangamo Capacitor	86-6-00696	Merchandise classified as electrical capacitors, fixed or variable at 10%
C87/248	Carman, J. December 29, 1987	Mattel, Inc.	85-4-00596	Item 737.22 17.5% Item 737.22 Various rates
C87/249	Carman, J. December 29, 1987	Saab-Totem, Inc.	84-7-00955S, etc.	Item 712.05 Various rates
C87/250	Carman, J. December 29, 1987	Saab-Totem, Inc.	84-9-01252	Item 712.05 17.5% or 15.6%

N DECISIONS — Continued

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
e	Item No. and rate		
or	Item A516.94 or A656.15 Free of duty	Sangamo Capacitor v. U.S., 779 F.2d 30 (1985)	Greenville-Spartansburg Silvered mica plates
	Item A774.60 Free of duty Item 774.60 8.5%	Mattel, Inc. v. U.S., S.O. 84-133	New York Base stands and leg holders
	Item 685.90 8.1%, 7.7%, 7.3%, 6.9%, 6.5%	Agreed statement of facts	Seattle Cameras
	Item 685.90 6.9% or 6.5%	Agreed statement of facts	Seattle Cameras

ABSTRACTED VALU

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
V87/341	Watson, J. December 14, 1987	J.E. Bernard	R63/4119, etc.	Export value
V87/342	Watson, J. December 15, 1987	Texas Instruments Inc.	79-10-01615	Constructed value
V87/343	Watson, J. December 15, 1987	Texas Instruments Inc.	82-5-00744	Constructed value
V87/344	Watson, J. December 15, 1987	Texas Instruments Inc.	82-6-00845	Constructed value
V87/345	Tsoucalas, J. December 16, 1987	Intalco Aluminum Corp.	83-9-01321	Computed value
V87/346	Watson, J. December 18, 1987	Artic Import Co.	R63/2821, etc.	Export value
V87/347	Watson, J. December 23, 1987	Texas Instruments Inc.	82-10-01367	Constructed value
V87/348	Watson, J. December 23, 1987	Texas Instruments Inc.	83-5-00676	Constructed value

UATION DECISIONS

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts
Said value is the net value claimed on the summons	Agreed statement of facts	Houston Not stated
Said value is the net value claimed on summons	Agreed statement of facts	Houston Semiconductor devices
Said value is the net value claimed on the summonses	Agreed statement of facts	Houston Semiconductor devices
Invoice unit values plus 6.18%	Agreed statement of facts	Blaine Calcined petroleum coke
F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts
Said value is 29.410%, 33.492% and 36.172% of entered value (net of all allowances under item 807.00)	Agreed statement of facts	Dallas Semiconductor devices
Said value is 40.239% of entered value (net of all allowances under item 807.00) or 40.239% of liquidated value	Agreed statement of facts	Houston Semiconductor devices

ABSTRACTED VALUATION D

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V87/349	Tsoucalas, J. December 23, 1987	Puma USA, Inc.	83-1-00108	Export value	In
V87/350	Tsoucalas, J. December 23, 1987	Puma USA, Inc.	83-5-00756	Export value	$6
V87/351	Tsoucalas, J. December 23, 1987	Puma USA, Inc.	83-6-00936	Export value	In
V87/352	Tsoucalas, J. December 23, 1987	Puma USA, Inc.	83-8-01191	Export value	In

DECISIONS — Continued

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
nvoiced price paid to Cosa Lieberman of Taiwan at $6.40 per pair plus 5% packed	Agreed statement of facts	Los Angeles Footwear
6.80 per pair plus 5% packed	Agreed statement of facts	Savannah Footwear
nvoiced price paid to Integrated Shoe, Inc. of the Phillippines at $8.26 per pair net packed, or $8. per pair net packed, or $6.03 net packed or $6.35 per pair net packed	Agreed statement of facts	Los Angeles Footwear
nvoiced price paid to Cosa Lieberman of Taiwan at $4.25 per pair plus 5% packed, or $4.35 per pair plus 5% or $4.45 per pair plus 5%	Agreed statement of facts	Savannah Footwear

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